(27,383)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PETITIONER,

vs.

McCAULL-DINSMORE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 29, 1920.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1919, of said Court, before the Honorable William C. Hook and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to wit: on the twentieth day of November, A. D. 1918, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the Chicago, Milwaukee & St. Paul Railway Company was Plaintiff in Error, and the McCaull-Dinsmore Company was Defendant in Error, which said transcript as prepared and printed in pursuance of the stipulation of the parties for the use of the Court upon the hearing of said cause, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to wit:

1 (*Stipulation as to Printing Record.*)

United States Circuit Court of Appeals Eighth Circuit.

It is hereby stipulated, in the above entitled cause, that the following named portions of the record herein, and none other, shall be printed for use on the hearing of the writ of error herein, to wit:

The complaint; the answer, omitting title; the stipulation of facts, omitting title; the findings; order for judgment and memorandum of the court, omitting title; the judgment, omitting title; the petition for writ, omitting title; the assignments of errors, omitting title; order for writ, omitting title; the writ and return, omitting title; the citation and proof of service, omitting title, and this stipulation, omitting title.

And said parties hereby designate the aforesaid mentioned portions of said record as parts thereof which they deem necessary or material for the consideration of the errors assigned herein.

Dated, August 29, 1918.

F. W. ROOT & NELSON J. WILCOX,
Attorneys for Plaintiff in Error.
COBB WHEELWRIGHT & DILLE,
Attorneys for Defendant in Error.

Endorsed: Filed in the U. S. Circuit Court of Appeals, November 25, 1918.

United States District Court District of Minnesota, Fourth Division.

No. 563.

McCaull-Dinsmore Company, Plaintiff,

vs.

Chicago, Milwaukee & St. Paul Railway Company, Defendant.

Pleas Before the Honorable the Judges of the District Court of the United States of America for the District of Minnesota, Fourth Division, at the April Term of Said Court Held in Said District in the Year of Our Lord, A. D. 1918.

2 District of Minnesota, *ss:*

. Be it Remembered that on the 23rd day of August, A. D. 1918, came the plaintiff above named by Messrs. Cobb, Wheelwright & Dille, its attorneys, and filed in the clerk's office of said court a certain complaint, which said complaint is in the words and figures following, to wit:

(*Complaint.*)

The plaintiff above named complains of the defendant above named and alleges:

1. That at all times hereinafter mentioned, plaintiff has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota, and is a citizen of said State, having its offices and principal place of business in the City of Minneapolis, County of Hennepin and State of Minnesota, and is a resident and inhabitant of said division.

2. That at all the times hereinafter mentioned, the defendant has been and now is a railway corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of said State, and engaged as a common carrier of freight and passengers for hire in the states hereinafter mentioned and engaged as a common carrier of freight and passengers for hire in the interstate commerce.

3. That at Three Forks, Montana, on the 17th day of November, 1915, the Three Valley Cooperative Association delivered to the defendant 88,000 pounds of number two hard Montana wheat, which was the property of the plaintiff and which was then and there loaded into Canadian Pacific car No. 210,470, and the defendant then and there issued its order bill of lading therefor and agreed to safely trans-

port said grain from Three Forks to Omaha, Nebraska, and there deliver the same to the plaintiff or to such person as it might designate.

4. That on or about the 5th day of December, 1915, said car and its said contents, through the carelessness and negligence of defendant were wrecked in transit and no part of said grain was ever transported to destination.

5. That ten days from the day when said car was loaded as aforesaid would have been a reasonable time in which to move said car of grain from said Three Forks to said Omaha; that the fair market value of said grain at the time and place of destination when it should have been delivered there by the defendant as aforesaid, with interest, less lawful freight charges, was the sum of One thousand four hundred and twenty-two and 11/100 dollars ($1,422.11); that no part of said sum of One thousand four hundred twenty-two and 11/100 dollars ($1,422.11) has ever been paid, except that the defendant paid to plaintiff on March 8, 1916, the sum of One thousand two hundred and 48/100 dollars ($1,200.48).

6. That paragraph 2 of Section 3 of said order bill of lading as amended by Supplement No. 6 to Western Classification No. 53, effective June 2d, 1915, provides as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid."

7. That the defendant claims that by virtue of said provision in said bill of lading, it is not liable for the value of said destroyed wheat at the point of destination, as alleged in paragraph 5 hereof, but is liable for the value thereof at the place and time of shipment.

8. That said provision in said bill of lading is expressly prohibited by the so-called Cummins Amendment, being the Act of Congress of March 4th, 1915, with respect to the regulation of common carriers of interstate and foreign commerce.

9. That this is a suit and proceeding arising under the Act of Congress of February 4th, 1887, and the several Acts amendatory thereof, and the said Act of March 4th, 1915, and is a suit and proceeding arising under the constitution and laws of the United States.

Wherefore, Plaintiff prays judgment against the defendant for the sum of Two hundred twenty-one and 63/100 ollars ($2,221.63) with terest on One thousand four hundred and twenty-two and 11/100 ($1,422.11) since the 27th day of November, 1915, and with interest on Two hundred twenty-one and 63/100 dollars ($221.63) since the

8th day of March, 1916, together with plaintiff's costs and disbursements herein.

COBB, WHEELWRIGHT & DILLE,
Attorney for Plaintiff, 311 *Nicollet Avenue, Minneapolis, Minnesota.*

Endorsed: Filed in the District Court on August 23, 1918.

4 (*Answer.*)

Answering the complaint herein the defendant admits the several allegations composing paragraphs 1 and 2 of said complaint;

Admits that at said Three Forks, Montana, on the 17th day of November, 1915, the Three Valley Cooperative Association delivered to the defendant a certain quantity of bulk wheat, contained in Canadian Pacific car Number 210,470, consigned and for transportation to McCaull-Dinsmore Co., for account of the McCaull-Dinsmore Company, Omaha, Nebraska.

Admits and alleges that co-incident with the delivery of said wheat to this defendant, this defendant issued to plaintiff its tariff standard bill of lading covering said transportation.

Admits and alleges that under and by virtue of said bill of lading it was agreed by and between the plaintiff and defendant in consideration for the rate agreed upon and charged for such transportation as aforesaid, that "the amount of any loss or damage for which any carrier should be liable should be computed on the basis of the value of the property at the place and time of shipment, including freight charges, if paid."

Defendant admits that on or about the 5th day of December, 1915, said car and contents were wrecked in transit, and no part of said grain was transported to destination.

Admits that ten days would have been a reasonable time in which to transport said car of grain from said Three Forks to said Omaha.

Admits that the defendant has paid to plaintiff, for such loss or damage as plaintiff has suffered by reason of the failure to transport said grain to destination, only the sum of Twelve Hundred and Forty-eight One Hundredths. ($1,200.48.)

Admits that the defendant claims as in Paragraph 7 of said complaint alleged.

Admits the allegations of Paragraph 9 of said complaint.

Save as hereinbefore admitted or alleged, the defendant denies the allegations of the complaint.

5 Wherefore, Defendant demands judgment against the plaintiff that it take nothing by its action and for defendant's costs and disbursements herein.

F. W. ROOT & NELSON J. WILCOX,
Attorneys for Defendant, 25 *Milwaukee Station, Minneapolis, Minn.*

Not verified.

Endorsed: Filed in the District Court on August 23, 1918.

Stipulation of Facts.

It is hereby stipulated and agreed by and between the parties to the above entitled action that the following are facts which will be admitted at the trial without further proof thereof:

That the plaintiff was and is a corporation, duly created, organized and exisiting under the laws of the State of Minnesota, and a citizen of said State, having its principal place of business in the city of Minneapolis, County of Hennepin, State of Minnesota, and is a resident and inhabitant of said Fourth Division;

That the defendant was and is a railway corporation of the State of Wisconsin and a citizen thereof; and was and is a common carrier of freight and passengers for hire in and between the states of Wisconsin, Minnesota, South Dakota, North Dakota, Montana, Iowa and Nebraska.

That at Three Forks, Montana, a station on the line of defendant, on the 17th day of November, 1915, there was delivered to the defendant, in Canadian Pacific car No. 210,470, by the Three Valley Cooperative Association, 87,840 pounds, or 1,464 bushels of No. 2 hard Montana wheat, consigned and for transportation to the McCaull-Dinsmore Company, for account of the McCaull-Dinsmore Company, Omaha, Nebraska; and that said wheat was the property of the plaintiff;

That at the time of such delivery of said wheat to the defendant there was entered into between the consignor thereof and the defendant a certain contract for the purpose of such receipt, transportation and delivery, which said contract is commonly known and referred to as a "uniform bill of lading;"

That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided, among others things, a rate of transportation based on and controlled by said bill of lading or contract; and said tariff further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs;

That said contract or bill of lading provided, among others things, as follows: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid;"

That on or about the 5th day of December, 1915, said car and contents were wrecked in transit, and the said wheat became so mixed and commingled with other wheat of other persons as to cause its identity to be lost, and no part of said grain was ever transported to destination;

That ten days was a reasonable time for the transportation of said car of grain from said Three Forks to said Omaha;

That the value of said wheat at the place and time of shipment was 82 cents per bushel;

That the fair market value of said wheat at destination, at the time when it should have been there delivered to the plaintiff, with interest, less lawful freight charges, is the sum of Fourteen Hundred and Twenty-two and 11/100 Dollars ($1,422.11); of which the plaintiff received from the defendant on March 8, 1916, the sum of Twelve Hundred and 48/100 Dollars, ($1,200.48);

That the defendant contends that, by virtue of said provision in said bill of lading, it is liable only for the value of said wheat at the place and time of shipment;

That the plaintiff contends that the defendant is liable for the market value of the wheat at destination at the time when it should have been there delivered to the plaintiff, less lawful freight charges.

It is further stipulated that this is a suit and proceeding arising under the Act of Congress of February 4, 1887, and the several Acts amendatory thereof, including the so-called "Cummins
7 Amendment" of March 4, 1915, and is a suit and proceeding arising under the Constitution and Laws of the United States.

COBB, WHEELWRIGHT & DILLE,
Attorneys for Plaintiff.

F. W. ROOT AND
NELSON J. WILCOX,
Attorneys for Defendant.

Dated August 23, 1918.

Endorsed: Filed in District Court on August 23, 1918.

(Findings of Fact and Conclusions of Law; Judgment, August 23, 1918.)

April Term, 1918.

Before Judge Morris.

McCAULL-DINSMORE COMPANY, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

The above entitled action came on for trial at the General April, A. D. 1918 Term of said Court before the undersigned, one of the Judges of said Court, upon an agreed statement of facts, a jury trial having been expressly waived by both parties hereto.

Messrs. Cobb, Wheelwright & Dille appeared as attorneys for the plaintiff, and F. W. Root, Esq. appeared as attorney for the defendant.

I hereby find the following facts established by the agreed written statement of facts and by the admissions of the parties.

Findings of Fact.

1. That the plaintiff was and is a corporation, duly created, organized and existing under the laws of the State of Minnesota, and a citizen of said State, having its principal place of business in the city of Minneapolis, County of Hennepin, State of Minnesota, and is a resident and inhabitant of said Fourth Division.

2. That the defendant was and is a railway corporation of the state of Wisconsin and a citizen thereof, and was and is a common carrier of freight and passengers for hire in and between the States of Wisconsin, Minnesota, South Dakota, North Dakota, Montana, Iowa and Nebraska.

3. That at Three Forks, Montana, a station on the line of defendant, on the 17th day of November, 1915, there was delivered to the defendant, in Canadian Pacific car No. 210,470,
8 by the Three Valley Cooperative Association, 87,840 pounds, or 1,464 bushels, of No. 2 hard Montana wheat, consigned and for transportation to the McCaull-Dinsmore Company, for account of the McCaull-Dinsmore Company, Omaha, Nebraska; and that said wheat was the property of the plaintiff.

4. That at the time of such delivery of said wheat to the defendant there was entered into between the consignor thereof and the defendant a certain contract for the purpose of such receipt, transportation and delivery, which said contract is commonly known and referred to as a "uniform bill of lading".

5. That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided, among other things, a rate of transportation based on and controlled by said bill of lading or contract; and said tariff further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs.

6. That said contract or bill of lading provided among other things, as follows: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid".

7. That on or about the 5th day of December, 1915, said car and contents were wrecked in transit, and the said wheat became so mixed and commingled with other wheat of other persons as to cause its identity to be lost, and no part of said grain was ever transported to destination.

8. That ten days was a reasonable time for the transportation of said car of grain from said Three Forks to said Omaha.

That the value of said wheat at the place and time of shipment was 82 Cents per bushel.

That the fair market value of said wheat at destination, at the time when it should have been delivered to the plaintiff, with interest, less lawful freight charges, is the sum of Fourteen Hundred and Twenty-two and 11/100 Dollars ($1,422.11); of which the plaintiff received from the defendant, on March 8, 1916, the sum of Twelve Hundred and 48/100 Dollars ($1,200.48).

9. That after the rate was fixed by the Interstate Commerce Commission the freight charges received by the defendant on said shipment of grain were based upon the weight of the grain shipped without regard to value.

That the defendant contends that, by virtue of said provision in said bill of lading, it is liable only for the value of said wheat at the place and time of shipment.

That the plaintiff contends that the defendant is liable for the market value of the wheat at destination at the time when it should have been there delivered to the plaintiff, less lawful freight charges.

That this is a suit and proceeding arising under the Act of Congress of February 4, 1887, and the several Acts amendatory thereof, including the so-called "Cummins Amendment" of March 4, 1915, and is a suit and proceeding arising under the Constitution and Laws of the United States.

Conclusions of Law.

As conclusions of law the Court finds that plaintiff is entitled to judgment against the defendant for the sum of Two hundred twenty-one and 63/100 Dollars ($221.63), with interest thereon since the 27th day of November, A. D. 1915, together with its costs and disbursements.

Let judgment be entered accordingly.

Dated this 23rd day of August, A. D. 1918.

PAGE MORRIS,
Judge.

Wherefore, By reason of the premises aforesaid, it is now by the Court

Considered, Ordered and Adjudged That the plaintiff McCaull-Dinsmore Company, do have and recover of and from the defendant, Chicago, Milwaukee & St. Paul Railway Company, the sum of Two Hundred Fifty-eight and 9/100 Dollars ($258.09), and that said plaintiff have execution therefor, together with its costs and disbursements in this action, to be taxed.

Further Ordered: That execution and all further proceedings herein, except the taxation of costs and entry of judgment therefor, be, and the same hereby are stayed for the period of thirty (30) days from this date to enable the defendant to sue out a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit if it shall be so advised.

10 *Memorandum Opinion of the District Court.*

The sole question in this case is, whether the loss to the shipper is to be measured by the value of the property at the place of destination at the time it should have been delivered, or by the value of the property at the time and place of shipment. And the decision of this question must depend upon whether or not the provision or stipulation in the bill of lading, issued by the carrier and accepted and agreed to by the shipper, that the loss should be measured by the value at the time and place of shipment and settled on that basis, was valid under the Cummins amendment of March 4, 1915, to the Interstate Commerce Act, which was the law in force at the time of the shipment and of the loss.

This amendment was passed after the decisions of the Supreme Court on the Carmack amendment cited by counsel had been rendered, and it is apparent from the language that its proposal and enactment were caused by these decisions and that it was aimed directly at them. Viewed in the light of those decisions and of the purpose evidently sought to be accomplished it is difficult to see how its language could be more sweeping.

"Shall be liable * * * for the full *actual loss* * * * caused by it * * * notwithstanding *any limitation* (the italics are mine) of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and *any such limitation* without respect to the manner or form in which it is sought, to be made, is hereby declared to be unlawful and void." This is the language of the amendment so far as it touches this case. The first proviso indicates the cases, of which this is not one, and the only cases, except from that language, and the only way in such cases of avoiding its terms, and thus emphasizes and, if it were possible, makes more sweeping those terms. I do not see that it can make any difference under the language quoted that this bill of lading was provided for in the schedule of rates filed with the Commission, and that that schedule of rates also provided another bill of lading under which, if issued and accepted, the rate would have been higher.

Under this language is the provision or stipulation above referred to in the bill of lading unlawful and void? If it is an agreement as to value, which I think it is not, it is clearly so. The answer
11 to the question must therefore be found in the answer to the further question, was this a limitation of the liability of the carrier or a limitation of the amount of recovery? And it seems to me the answer to this question is found in the answer to the further question, what would have been the liability of the carrier, and the consequent amount of recovery, if that provision or stipulation had not been in the bill of lading? In the latter case there can be no question, and it was so admitted on the argument, as it had to be, but the liability and the consequent amount of the recovery would

have been that of the common law, namely, the value of the goods at the point of destination at the time they should have been delivered. And that this is the actual loss to the shipper caused by the failure of the carrier to deliver the goods at that time and place, whether the value is greater or less than at the time and place of shipment, is the foundation of the common law rule.

From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open minded consideration of the language of the amendment and the obvious and well known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void.

In reaching this conclusion I have not failed to consider the very able argument of counsel for defendant and also what has been said by the Interstate Commerce Commission, and it is with regret and not a little misgiving that I find myself in difference with men so able and experienced in such matters. But consider the matter as I may I am always irresistibly brought back to this simple statement and to the necessary conclusion therefrom.

I cannot see that there could be any greater difficulty, after loss has occurred, in ascertaining and proving the value at the time and place of delivery or destination than in ascertaining and proving the value at the time and place of shipment.

If it be true, as suggested in the argument and by the Commission, as I think it may be, that the conclusion which I have reached will result in difficulties and confusion in existing rules and regulations and schedules, and in some cases under these rules and regulations and schedules in hardship and injustice to the carriers and possibly in some discrimination amongst shippers, the remedy will be found in facing the law, whose language, as it seems to me, is too plain for construction or evasion, squarely, and revising and
12 reconstructing those rules and regulations to meet it.

PAGE MORRIS,
Judge.

Aug. 23, 1918.

Endorsed: Filed in the District Court on August 23, 1918.

(*Assignment of Errors.*)

Now comes the said Chicago, Milwaukee & St. Paul Railway Company, the defendant above named, and avers that in the entry of the judgment in the above entitled cause, and in the proceedings prior thereto, manifest error was committed by the Trial Court, that is to say;

The said District Court erred:

I.

In holding and adjudging that the provision in the bill of lading, issued by the defendant and accepted and agreed to by the plaintiff,

that the loss should be computed on the basis of the value of the property at the place and time of shipment, was invalid.

II

In holding and adjudging that the provision in the bill of lading that the loss should be computed on the basis of the value of the property at the place and time and shipment constitutes a limitation of liability.

III.

In holding and adjudging that the provision in the bill of lading that the loss should be computed on the basis of the value of the property at the place and time of shipment constitutes a limitation of the amount of recovery.

IV.

In holding and adjudging that the loss in this case is not to be measured by the value of the property at the place and time of shipment, as provided in the contract of shipment.

V.

In holding and adjudging that the loss in this case is to be measured and determined by the value of the property at the time and place of destination.

VI.

In rendering judgment in favor of the plaintiff and against the defendant for the loss to plaintiff, computed on the basis of
13 the value of the property at the time and place of destination, instead of at the place and time of shipment.

Wherefore, the said defendant prays that the judgment of the United States District Court, District of Minnesota, Fourth Division, in the above entitled cause, be reversed and annulled.

F. W. ROOT &
NELSON J. WILCOX,
Attorney- for Defendant.

Endorsed: Filed in the District Court on August 28, 1918.

(*Petition for Writ of Error.*)

Now comes the Chicago, Milwaukee & St. Paul Railway Company, the defendant in the above entitled cause, and says that on the 23rd day August, 1918, this Court entered judgment in said cause in favor of the above named plaintiff and against this defendant for Two Hundred Fifty-Eight and 09/100 Dollars ($258.09). That in said

judgment and in the proceedings in said cause had prior thereto, certain errors were committed to the prejudice of this defendant; which errors will more in detail appear from the Assignments of Errors annexed to this Petition and herewith filed.

Wherefore, this defendant prays that a writ of error may issue in its behalf, returnable to the United States Circuit Court of Appeals, for the Eight- Circuit of the United States, for the correction of the errors so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that the judgment aforesaid be there reversed.

Dated August 28, 1918.

F. W. ROOT &
NELSON J. WILCOX,
Attorney- for Defendant.

Endorsed: Filed in the District Court on August 28, 1918.

(Order Allowing Writ of Error.)

The defendant in the above entitled action having filed in this Court a petition praying that a writ of error issue from the Circuit Court of Appeals for the Eight- Circuit, directed to the United States District Court, District of Minnesota, Fourth Division, to re-
14 verse the judgment heretofore entered in the above entitled Court, on the 23rd day of August, 1918, in favor of the plaintiff above named and against the defendant above named, for the sum of Two Hundred Fifty-Eight and 09/100 Dollars ($258.09), and also a stipulation waiving any bond or undertaking:

It is hereby ordered, that the prayer of said petition be granted, and that a writ of error be issued as prayed for.

Dated Aug. 28, 1918.

WILBUR F. BOOTH, *Judge.*

Endorsed: Filed in the District Court on August 28, 1918.

(Stipulation Waiving Bond on Writ of Error.)

Whereas, the defendant in the above entitled cause is about to petition the Court that a writ of error issue, returnable to the United States Circuit Court of Appeals, for the Eight- Circuit of the United States, for the correction of the errors complained of in the Assignments of Errors annexed to said Petition; the said plaintiff hereby will, and does, for all such purposes, waive any bond or undertaking on the part of the defendant whether for costs or damages, or for any other purpose.

Dated Aug. 28, 1918.

COBB, WHEELWRIGHT & DILLE,
Attorney- for Plaintiff.

Endorsed: Filed in the District Court on August 28, 1918.

(*Writ of Error and Clerk's Return.*)

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the April Term, 1918, thereof, between McCaull-Dinsmore Company, Plaintiff, and Chicago, Milwaukee & St. Paul Railway Company Defendant, manifest error hath happened, to the great damage of the said Chicago, Milwaukee & St. Paul Railway Company as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 28th day of October, 1918, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 28th day of August, A. D. 1918.

Issued at office in Minneapolis, Minnesota, with the seal of the District Court of the United States, for the District [*or*] Minnesota, Fourth Division.

[Seal U. S. Dist. Court, Dist. of Minnesota, Fourth Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States, for the District of Minnesota.
By THOMAS H. HOWARD,
Deputy.

Allowed by:
WILBUR F. BOOTH,
Judge.

Filed August 28th, 1918. Charles L. Spencer, Clerk, by Thomas H. Howard, Deputy.

UNITED STATES OF AMERICA,
District of Minnesota, Fourth Division, ss:

In obedience to the command of the above writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceed-
16 ings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the Seal of the District Court of the United States for the District of Minnesota, Fourth Division.

[Seal U. S. Dist. Court, Dist. of Minnesota, Fourth Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.
By THOMAS H. HOWARD,
Deputy.

Endorsed: Filed in the District Court on August 28, 1918.

(*Citation and Admission of Service.*)

UNITED STATES OF AMERICA, *ss:*

To McCaull-Dinsmore Company, Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States District Court, District of Minnesota, Fourth Division, wherein the Chicago, Milwaukee & St. Paul Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wilbur F. Booth, Judge of said Court, this 29th day of August, in the year of our Lord one thousand nine hundred and eighteen.

WILBUR F. BOOTH,
Judge of said Court.

Due service of the foregoing Citation, by Copy, at Minneapolis, Minnesota, is hereby admitted this 29th day of August, 1918.

COBB, WHEELWRIGHT & DILLE,
Attorneys for Defendant in Error.

Endorsed: Filed in the District Court on September 3, 1918.

17 (*Clerk's Certificate to Transcript.*)

United States of America, District of Minnesota, Fourth Division.

I, Charles L. Spencer, Clerk of said District Court, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Eighth Circuit that the foregoing, consisting of 23 pages, numbered consecutively from 1 to 23, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment and all other proceedings in said cause wherein McCaull-Dinsmore Company is plaintiff and Chicago, Milwaukee & St. Paul Railway Company is defendant, and of the whole thereof, as appears from the original record and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Minneapolis in the District of Minnesota this 24th day of October, A. D. 1918.

[Seal U. S. Dist. Court, Dist. of Minnesota, Fourth Division.]

CHARLES L. SPENCER,
Clerk.
By THOMAS S. HOWARD,
Deputy.

Filed Nov. 20, 1918. E. E. Koch, Clerk.

18 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Plaintiff in Error.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5314.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO., Plaintiff in Error,

vs.

McCAULL-DINSMORE COMPANY.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

F. W. ROOT &
NELSON J. WILCOX,
Minneapolis, Minn.
O. W. DYNES,
Chicago, Ill.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 20, 1918.

(*Appearance of Counsel for Defendant in Error.*)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

ALBERT C. COBB,
J. O. P. WHEELWRIGHT,
JOHN I. DILLE,
311 *Nicollet Ave.*,
Minneapolis, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 24, 1919.

19 (*Order of Submission.*)

May Term, 1919.

Monday, May 19, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. F. W. Root for plaintiff in error and concluded by Mr. J. O. P. Wheelwright for defendant in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

20 (*Opinion.*)

United states Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1919.

No. 5314.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Plaintiff in Error,

vs.

McCAULL-DINSMORE COMPANY, Defendant in Error.

In Error to the District Court of the United States for the District of Minnesota.

Mr. F. W. Root (Mr. Nelson J. Wilcox was with him on the brief), for plaintiff in error.

Mr. J. O. P. Wheelwright, for defendant in error.

Before Hook and Stone, Circuit Judges, and Amidon, District Judge.

STONE, *Circuit Judge*, delivered the opinion of the Court:

Action for loss of interstate shipment of grain. The facts were stipulated. The shipment was made under a bill of lading or shipping contract wherein it was provided that "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." The contract was in a form like that included in the legally published tariffs filed with the Interstate Commerce Commission, which tariffs provided, among other things, a rate of transportation based on and controlled by said form of bill of lading, and that in cases where the shipper was not agreeable to shipping under the terms of such form, then a higher rate was to be charged. The fair market
21 value of the shipment at destination at the time when it should have been delivered, with interest and less freight charges was $1,422.11. The railway has paid thereon $1,200.48, the value at origin at time of shipment. From a judgment for the difference the railway has taken its writ of error. The controversy is over the difference, and the sole question here presented is whether the origin value or the destination value should govern where the shipment was under such a form of interstate bill of lading.

At the time of this shipment the so-called Cummins Amendment of March 4, 1915 (38 Stat. 1196), contained the law in this respect governing form of contracts for interstate shipment. That statute provided:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be

liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common
22 carrier railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."

The railway seeks to avoid the application of this provision by contending that it, in the present instance, has not sought to limit its liability, but has on the contrary defined liability for the full actual loss, and has by its tariffs thus crystal-ized the method of arriving at the actual loss. We deem such contention unsound. There was no uncertainty as to the time or place of estimating value under the rule of common law—it was the destination. The evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law, for the obvious object of escaping a higher valuation which would often arise at destination. Such a provision is unquestionably a limitation, since it forbids application of the established rule.

The railway also says: "The rule, as we contend, was that in the absence of contract, destination value would apply, but that it was not unlawful to agree upon origin value." Whether the
23 parties could so agree at the common law is not material. The Cummins Amendment was not concerned alone with preventing contracts already illegal under the common law, but with prohibiting all agreements having the effect defined by that statute. Congress passed this Act to remedy the defects in the Carmack Amendment (34 Stat. 595) as developed in the case of Adams Express Co. v. Croninger, 226 U. S. 491, and intended thereby to fully

and finally prevent all limitations of this character. Congressional Record, 63rd Congress 3rd Session, Vol. 52, pp. 5446-5451.

The judgment is

Affirmed.

Filed September 22, 1919.

24 (*Judgment.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1919.

Monday, September 22, 1919.

No. 5314.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Plaintiff in Error,

vs.

McCAULL-DINSMORE COMPANY,

In Error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the McCaull-Dinsmore Company have and recover against the Chicago, Milwaukee and St. Paul Railway Company the sum of twenty dollars for its costs herein and have execution therefor.

September 22, 1919.

25 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota, as prepared and printed, pursuant to the stipulation of the parties, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a

certain cause in said Circuit Court of Appeals wherein the Chicago, Milwaukee & St. Paul Railway Company was plaintiff in error, and the McCaull-Dinsmore Company was Defendant in Error, No. 5314, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of October, A. D. 1919.

[Seal United States Circuit Court of Appeals Eighth Circuit.]

E. E. KOCH.
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

26 Supreme Court of the United States.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Petitioner,

vs.

McCAULL-DINSMORE COMPANY, Respondent.

The Supreme Court having granted a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Eighth Circuit, in the suit therein pending in which the Chicago, Milwaukee & St. Paul Railway Company was plaintiff-in-error and McCaull-Dinsmore Company, defendant-in-error, Number 5314;

Now therefore, it is hereby stipulated and agreed, that the transcript of record certified by the clerk of said United States Circuit Court of Appeals under date of the 27th day of October, A. D. 1919, and filed in the office of the clerk of said Supreme Court on or about the 17th day of December, 1919, shall be taken as a return to said writ of certiorari by the Judges of the United States Circuit Court of Appeals to whom the said writ is directed.

Dated January 31st, 1920.

H. H. FIELD.
O. W. DYNES.
F. W. ROOT,
Counsel for Petitioner.
J. O. P. WHEELWRIGHT,
Counsel for Respondent.

27 [Endorsed:] No. 628. Supreme Court of the United States. Chicago, Milwaukee & St. Paul Railway Company, Petitioner, vs. McCaull-Dinsmore Company, Respondent. Stipulation as to Return to Writ of Certiorari. Original Filed Feb. 7, 1920, E. E. Koch, Clerk.

28 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Chicago, Milwaukee & St. Paul Railway Company is plaintiff in error, and McCaull-Dinsmore Company is defendant in error, No. 5314, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
29 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed.] File No. 27,383. Supreme Court of the United States, No. 628, October Term, 1919. Chicago, Milwaukee & St. Paul Railway Company vs. McCaull-Dinsmore Company. Writ of Certiorari. Filed Feb. 7, 1920. E. E. Koch, Clerk.

30 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in Error, vs. McCaull-Dinsmore Company, No. 5314, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this seventh day of February, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

31 [Endorsed:] File No. 27,383. Supreme Court U. S. October Term, 1919. Term No. 628. Chicago, Milwaukee & St. Paul Railway Co., Petitioner, vs. McCaull-Dinsmore Company. Writ of certiorari and return. Filed Feb. 9, 1920.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

MOTION TO ADVANCE CASE.

H. H. FIELD,
O. W. DYNES,
F. W. ROOT,
Counsel for Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

MOTION TO ADVANCE CASE.

Now comes the Chicago, Milwaukee & St. Paul Railway Company, petitioner, and moves this Honorable Court to advance this cause for early hearing and determination, within the contemplation of paragraphs 5 and 7 of Rule 26 of the published rules of this court, and in support of this motion submits the following:

First. The case is one in which the United States are concerned in that its final determination by this court will necessarily govern the treatment of many thousand claims against the United States Railroad Administration similar in nature and principle to the case at bar. Said claims against the United States Railroad Adminis-

tration involve in aggregate a vast sum of money that must be paid out of the funds of the United States Government, if the judgment in the instant case is affirmed.

Second. The case involves an action for loss of an interstate shipment of grain. The facts are agreed upon and presented in the record in the form of a stipulation by the parties. The shipment was made under a bill of lading or shipping contract wherein it was provided that:

> "The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid." (Trans., 6.)

The contract of shipment conformed to the provisions of the legally published tariffs filed with the Interstate Commerce Commission which tariffs provided, among other things, a rate of transportation based on and controlled by said form of bill of lading and that in cases where the shipper was not agreeable to shipping under the terms of such form a higher rate would be charged.

The petitioner admitted the loss and its liability therefor upon the basis of said clause, to wit: the value of the property at the place and time of shipment, and the petitioner has paid the respondent an amount representing such value. (p. 6.) Respondent claimed the value of the wheat at destination at the time when it should have been delivered there with interest less freight charges. (p. 2.) The amount sued for is the difference between the amount thus claimed by respondent and the amount paid by petitioner, to wit: $221.63, with interest.

Third. The cause was tried in the District Court upon the pleadings and stipulation of facts and that court found in favor of respondent. (252 Fed., 664.) Upon judgment being entered on that finding writ of

error was sued out of the Circuit Court of Appeals. The latter tribunal affirmed the judgment on September 22, 1919. (pp. 19-21.)

Chicago, Milwaukee & St. Paul Railway Company v. *McCaull-Dinsmore Company*, 260 Fed., 835.

Fourth. The case is one involving general public interest for the reason that substantially all of the railroads of the United States are using a uniform or standard bill of lading containing the clause quoted in paragraph *Second, supra,* and claims of innumerable shippers aggregating many hundred thousand in number, a part of which arose prior to federal control and a part during federal control, are outstanding and will in the main await disposition depending upon the decision of this court in the case at bar.

Fifth. The standard form of bills of lading is still in use and additional claims of shippers are daily accumulating.

Sixth. The standard bills of lading that have been and now are in use provide a period of limitations within which suits may be brought and if the case at bar awaits its regular turn on the calendar, many thousand claims will need be put in suit in order to toll the period of limitations. A vast number of such suits, with their attending costs in time and money, will be obviated if the cause is advanced in accordance with this motion.

Seventh. We are advised that the United States Railroad Administration, by its proper legal officer, will ask leave to join in this motion.

We are advised by the Chairman of the Interstate Commerce Commission it is the desire of that body the cause be advanced, and we are advised it is agreeable

to the respondent that an order advancing the cause be entered.

A more detailed statement of the case is contained in the petition of petitioner on file in this cause and on which this court issued a writ of certiorari.

Respectfully submitted,

H. H. FIELD,
O. W. DYNES,
F. W. ROOT,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

H. H. FIELD,
O. W. DYNES,
F. W. ROOT,
Counsel for Chicago, Milwaukee & St. Paul Railway Company, Petitioner.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

GENERAL INDEX.

List of Cases Cited.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Now comes the Chicago, Milwaukee & St. Paul Railway Company and respectfully petitions this court to grant a writ of certiorari to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the cause therein pending, numbered 5314, wherein petitioner is plaintiff in error and McCaull-Dinsmore Company is defendant in error, and states:

This action was brought in the District Court of the United States for the District of Minnesota, by respondent to recover of petitioner $221.63, with interest, as a part of the damages for the loss of a car of wheat shipped from Three Forks, Montana, on November 17, 1915, to Omaha, Nebraska, consigned to respondent. The shipment was made under a bill of lading, issued by petitioner, containing the following clause:

> "The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of

> the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid." (Trans., 6.)

Petitioner admitted the loss, and its liability therefor, upon the basis of said clause, to wit: "the value of the property at the place and time of shipment." It had paid respondent an amount representing such value. (p. 6.) Respondent claimed the value of the wheat "at the time and place of destination when it should have been delivered there" with interest, less freight charges. (p. 2.) The amount sued for represents the difference between the amount claimed by respondent and the amount paid by petitioner.

The jurisdiction of the District Court was invoked upon the ground that the suit arose under the Act to Regulate Commerce, approved February 4, 1887, and the several acts amendatory thereof, particularly the Act of March 4, 1915 (38 Stats., 1196) known as the First Cummins Amendment, respondent claiming that said provision in the bill of lading was expressly prohibited by that amendment, and petitioner contending to the contrary. (pp. 3, 9.)

The cause was tried in the District Court upon the pleadings and a stipulation of facts and that court found in favor of respondent. (252 Fed. Rep., 664.) Judgment was entered for the amount claimed, with interest, on August 23, 1918. (pp. 7-9.) Petitioner sued out a writ of error from the Circuit Court of Appeals to review such judgment, and after a hearing in that court, the judgment was affirmed on September 22, 1919. (pp. 19-21.)

The reasons relied on for the allowance of the writ are as follows:

I.

The decision of the Circuit Court of Appeals holding that the clause in question was void under the First Cummins Amendment of March 4, 1915, was based upon an erroneous interpretation of the language of that amendment.

II.

The Circuit Court of Appeals, through an erroneous construction, has given to that amendment the effect of abrogating the rule of law established by the decisions of this court, sustaining the principle of the clause in question, and has reached the conclusion that because of said Amendment carriers may no longer, by agreement with shippers in a bill of lading, provide that the amount of loss and damage shall be ascertained on the basis of value at time and place of shipment.

III.

The decision of the Circuit Court of Appeals creates a conflict of decision in the Federal courts, in that it is opposed to the decision of the District Court of the Southern District of Ohio, Western Division, Sixth Circuit, rendered June 11, 1919, in *Springfield Light, Heat & Power Company* v. *Norfolk & Western Railway Co.*, reported in 260 Fed. Rep., 254, 261, wherein the clause in question was held to be valid. While the opinion in that case does not refer, in terms, to the First Cummins Amendment, it is a fact that the cause of action therein arose subsequent to that act; that, pending the determination of that suit, the attention of the court was called

to the opinion of Judge Morris in the District Court, in the case at bar (252 Fed. Rep., 664) rendered August 23, 1918, and counsel for defendant in the Ohio case, filed a brief contending that the opinion proceeded upon an erroneous interpretation of the amendment. There was no review of the Ohio case by appeal or writ of error.

IV.

These conflicting decisions, establishing different rules of law in the two circuits, place carriers operating in or through both circuits, either individually or under joint through rates, in the position of making unlawful discriminations if claims originating in the Eighth Circuit are settled on the basis of the decision in the case at bar, while claims originating in the Sixth Circuit are settled on the basis of the Ohio decision. The decisions leave carriers in other circuits, as well as in these, in uncertainty as to the proper rule to follow in settlement of claims, and this uncertainty is emphasized by the fact that under the Carmack Amendment (Section 20) the initial carrier may be sued wherever jurisdiction over it may be obtained, or an intermediate or final carrier may be sued, upon common law principles, upon evidence showing its liability.

V.

The clause in question is a standard clause of the uniform bill of lading, as revised June 2, 1915, pursuant to the report of the Commission of May 7, 1915, *In re the Cummins Amendment*, 33 I. C. C. Reps., 682, in which it was held (pp. 693, 697) that the clause was not unlawful under that amendment. Since June 2, 1915, it has been

and still is, in general use by rail carriers throughout the United States.

The District Court found as a fact (p. 8, Finding 5):

> "That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided, among other things, a rate of transportation based on and controlled by said bill of lading or contract; and said tariff further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs."

and (Finding 6) that the contract or bill of lading issued in the case at bar, contained the clause in question.

The judgment of the Circuit Court of Appeals in the case at bar has the effect of nullifying the administrative action of the Interstate Commerce Commission taken by that body for the purpose of effecting uniformity in the treatment by carriers of shippers' claims. The Commission has expressly approved the clause and has authorized its publication as a tariff provision as well as a provision of the uniform bill of lading. No sufficient reason appears of record for holding that this administrative action is outside the lawful function of the Interstate Commerce Commission.

VI.

A vast volume of lawsuits will be obviated by a final determination in this court of the issues this action presents.

While this case, in itself, involves but a small amount, yet it is a test case the determination of which will govern the settlement of many hundred thousand claims now pending against carriers. Innumerable additional

claims will inevitably arise out of the thousands of bills of lading carriers are issuing daily. Many million dollars are involved in the aggregate. The clause is uniform in intrastate bills of lading as well as interstate bills of lading. If this defendant and other carriers adhere to the clause, multifarious litigations will result because of the decision of the Circuit Court of Appeals of the Eighth Circuit in the case at bar. If the clause is abandoned, the carriers will pay out vast sums in claim settlements that they might not be required to pay under the law as this court would construe and apply it.

H. H. FIELD,
O. W. DYNES,
F. W. ROOT,
Counsel for Chicago, Milwaukee & St. Paul Railway Company, Petitioner.

Supreme Court of the United States.

October Term, A. D. 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Authority for the Issuance of the Writ.

The complaint alleged (p. 3), the answer admitted (p. 4) and the court found (p. 9) that the suit was one arising under the Constitution and Laws of the United States; hence, it was not of a class in which the judgment was made final by Section 128 of the Judicial Code, but the amount involved being less than $1,000, the judgment was final in respect of the right to an appeal or writ of error, under Section 241. But this court may issue a writ of certiorari under either the last clause of Section 239 (*Lau Ow Bew* v. *U. S.*, 141 U. S., 583; S. C., 144 U. S., 47, 58; *American Construction Co.* v. *J. T. & K. W. R. R.*, 148 U. S., 372, 382), or Section 240 (*U. S.* v. *Beatty*, 232 U. S., 463, 466; *S. P. L. A. & S. L. R. R. Co.* v. *U. S.*, 247 U. S., 307, 309), or Section 716 R. S., now Section 262 Judicial Code (*American Construction Co.* v. *J. T. & K.*

W. R. R. Co., 148 U. S., 372, 382; *U. S.* v. *C. B. & Q. R. R. Co.*, 235 U. S., 696; 237 U. S., 410; *McClellan* v *Carland*, 217 U. S., 268, 279.)

This court has frequently granted writs of certiorari in actions brought to recover penalties under the Hours of Service Act, and the 28-Hour Act, where the judgments were for less than $1,000. (*A. T. & S. F. Ry. Co.* v. *U. S.*, 244 U. S., 336; *C. & A. R. R. Co.* v. *U. S.*, 247 U. S., 197; *U. S.* v. *C. B. & Q. Ry. Co.*, 237 U. S., 410; *C. & N. W. R. Co.* v. *U. S.*, 246 U. S., 512.)

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE PROVISION OF THE BILL OF LADING UNDER CONSIDERATION WAS VOID UNDER THE ACT OF MARCH 4, 1915, KNOWN AS THE FIRST CUMMINS AMENDMENT.

That act (38 Stats. 1196) amended the Carmack Amendment approved June 29, 1906 (34 Stats. 595) which was itself an amendment of Section 20 of the Interstate Commerce Act. So much of the First Cummins Amendment as is here material is set forth below, the portions italicized being the Carmack Amendment as originally enacted:

> "*That any common carrier, railroad, or transportation company* subject to the provisions of this act *receiving property for transportation from a point in one state* or territory or the District of Columbia *to a point in another state*, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country *shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose*

line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading *and no contract, receipt, rule or regulation,* or other limitation of any character whatsoever, *shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed;* and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void. * * * *Provided* further, *That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law.*"

This amendment took effect June 2, 1915. There was a proviso (indicated by the stars) relating to goods hidden from view, etc., which was amended by the Act of August 9, 1916 (39 Stats. 441) known as the Second Cummins Amendment, which is not involved in this case.

It may be well to state briefly the result of the decided cases, under the common law, and those declaring the purpose and effect of the Carmack Amendment as it existed prior to the First Cummins Amendment.

The general rule at common law was that damages for the loss of or injury to property should be computed upon the basis of its market value at the place where, and the time when, the shipment was to be delivered.

M. & M. Ry. Co. v. *Jurey*, 111 U. S., 584, 596.
N. Y. L. E. & W. R. Co. v. *Estill*, 147 U. S., 591, 617.
The Oneida, 128 Fed., 687, 692.
Inman & Co. v. *S. A. L. Ry. Co.*, 159 Fed., 960, 974.

The rule, however, was subject to exceptions and was not universal.

Hutchinson on Carriers (3rd Ed.), Sec. 1361.
The Protection, 102 Fed., 516, 520.
Magnin v. *Dinsmore*, 62 N. Y., 35, 45, 46.

It was also well settled that it was lawful to prescribe in the bill of lading that the damages should be computed upon the basis of the origin value; that is, value at the time and place of shipment. This was accomplished by two provisions, one or the other of which has appeared in the uniform bill of lading since its approval by the Interstate Commerce Commission in its report of June 27, 1908, *In the Matter of Bills of Lading*, 14 I. C. C. Reps., 346.

(1) The clause the Commission approved (p. 353) and which was adopted, provided that: "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee,

including the freight charges, if prepaid) at the place and time of shipment, under this bill of lading, unless a lower value has been represented in writing by the shipper, etc." This clause was again approved and held valid by the Commission in *Shaffer & Co.* v. *C. R. I. & P. Ry. Co.*, 21 I. C. C. Reps., 8, where the conclusion was reached (p. 13) that the invoice clause "*simply determines the time, place and manner in which that value shall be definitely ascertained.*" The invoice clause has been sustained by this court and by a majority of the state courts:

N. Y. P. & N. R. Co. v. *P. P. Exchange*, 240 U. S., 34, 41.

P. Ry. Co. v. *Olivit Bros.*, 243 U. S., 574, 586.

G. C. & S. F. Ry. Co. v. *Texas Pkg. Co.*, 244 U. S., 31, 36.

Many of the state decisions are cited in the *Notes to Wallingford* v. *A. T. & S. F. Ry.* (101 Kan., 544) as reported in L. R. A. 1918B, 716, 721, Note 3.

(2) Then came the change in the language of the provision to that used in the clause in question, following the revision of the uniform bill of lading June 2, 1915, pursuant to the report of the Commission of May 7, 1915, *In re the Cummins Amendment*, 33 I. C. C., 682, 693, 697, the Commission holding that the clause in question was not unlawful under that amendment. The clause in its present form had been sustained by the preponderance of decisions in the federal and state courts prior to the amendment.

Phoenix Ins. Co. v. *E. & W. Transportation Company*, 117 U. S., 312, 322.

Inman & Co. v. *S. A. L. Ry. Co.*, 159 Fed., 960, 974.

Wallingford v. *Ry. Co.* and notes, *supra.*

Manifestly the decisions upon either clause, however, worded, sustain the principle of *origin value*.

THE CARMACK AMENDMENT.

"The purpose of the Carmack Amendment has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination."

M. K. & T. Ry. Co. v. *Ward*, 244 U. S., 383, 386, and cases cited in Note 2.

"Congress intended to take possession of the subject of liability of carriers under bills of lading which they must issue, and to supersede all state regulation with reference thereto."

Adams Exp. Co. v. *Croninger*, 226 U. S., 491, 505, 506.

It is also well settled by decisions of this court that the Carmack Amendment did not change the existing rule of law which permitted the carrier and the shipper to make a contract limiting recovery to a valuation declared by the shipper, in consideration of a reduced rate for the carriage. "Such contracts of shipment this court has held not to be in contravention of the settled principles of the common law preventing a carrier from contracting against liability for losses resulting from its own negligence, and are lawful limitations upon the amount of recovery binding upon the shipper upon principles of estoppel."

B. & M. R. R. v. *Piper*, 246 U. S., 439, 443, 444.

The purpose and effect of the Carmack Amendment having been thus clearly established by decisions of this court prior to the passage of the First Cummins Amendment, the question is to what extent that act was intended to change the existing rule of law that an agreement be-

tween a shipper and a carrier as to the value of the property transported was valid. The intent must be found in the language—

> "shall be liable * * * for the full actual loss, damage, or injury to such property * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

Undoubtedly the amendment invalidated agreements as to value such as were sustained in *Hart* v. *Penna. R. R. Co.*, 112 U. S., 331; *Adams Express Co.* v. *Croninger*, 226 U. S., 491; *K. C. S. R.* v. *Carl*, 227 U. S., 639; *M. K. & T. R. Co.* v. *Harriman Bros.*, 227 U. S., 657, and other cases, so that the shipper and the carrier may no longer agree that in case of loss or damage the liability shall be limited to a specified amount. But we contend that the clause under consideration properly construed, is not an agreement of that character and is not forbidden by the amendment. On the contrary, it provides a rule for determining the full actual loss and damage—

> "to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier."
>
> *Bernard* v. *Adams Express Company*, 205 Mass., 254, quoted in the Croninger case, *supra*, 511.

The Term "Actual Loss."

The value of a shipment at the time and place of shipment is not a speculative value or an estimated value, but is the actual value. Loss of or damage to a shipment computed on a basis of value at time and place of shipment is not a speculative loss or an estimated loss but the actual loss.

By the Carmack Amendment the carrier was made liable for "any loss, damage or injury" that might occur to the shipment. The First Cummins Amendment differs from the Carmack Amendment in that it uses the term "full actual loss" instead of the term "any loss" and provides the carrier shall be liable to the shipper for "the full actual loss, damage or injury to the shipment notwithstanding any limitation of liability or limitation of the amount of recovery." The term "actual loss" was apparently used in contradistinction from speculative loss and from estimated loss.

Under the term "any loss" used in the Carmack Amendment, a speculative loss or an estimated loss was included. Under the term "actual loss" of the First Cummins Amendment they are excluded.

The clause of the bill of lading and of the tariff which provides that loss and damage shall be computed on the basis of value at time and place of shipment, clearly contemplates the payment of the full actual loss and clearly contemplates avoiding a speculative loss or an estimated loss. Destination value is often highly speculative, due to fluctuations of terminal markets that cannot be foretold and due, sometimes, to other causes such as deterioration and shrinkage. At the time the bill of lading is executed destination value is a thing of the future and affords not an actual but a specula-

tive basis of value. It seems clear that value at time and place of shipment means actual value and loss computed thereon means actual loss. If this reasoning is sound, it follows as a corollary that the clause of the bill of lading does not limit or restrict the loss or damage recovered but, on the contrary, contemplates the payment of the full actual loss and damage.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CONSTITUTES AN UNWARRANTED INVASION OF THE ADMINISTRATIVE FUNCTIONS OF THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission acted within its lawful administrative functions in authorizing the practice by the carriers of incorporating in their uniform bills of lading and in their tariffs and classifications the provision that value at the time and place of shipment would govern in the settlement of loss and damage claims.

Section 15 of the Act to Regulate Commerce, as amended, contains, among other things, the following:

> "The Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation or practice is just, fair and reasonable to be thereafter followed."

Pursuant to the authority contained in the foregoing quotation, the Commission entered upon a consideration of the reasonableness, fairness and justness of the joint classification, the uniform regulation and the uniform practice of the carriers with regard to providing in their bills of lading, joint classifications and tariffs that the value at time and place of shipment would govern in making settlements of shippers' loss and damage claims.

That proceeding is entitled, *"In Re The Cummins Amendment,"* 33 I. C. C., 682. At page 693 the Commission, in concise language, states the question before it, its reasoning and its conclusions thereon, as follows:

> "2. May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?
>
> It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations.
>
> The Cummins amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

The fundamental purpose of the Act to Regulate Commerce is to secure uniformity and eliminate discrimina-

tion in the treatment by carriers of matters arising between them and shippers. The action of the Interstate Commerce Commission, as evidenced by the language quoted above, was directed to that very end.

The Commission approved the practice of publishing to the world, through the carriers' joint classifications and tariffs, that all shippers' claims would be treated alike in respect of using the value at point of origin as basic in making settlement. A tariff was accordingly published and in effect at the time the shipment moved which recited the provision of the bill of lading under discussion. (Rec., 5-6.)

In *Mitchell Coal & Coke Company* v. *Penna. R. Co.*, 230 U. S., 247, 255, the court said:

> "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries, the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

If, in the case at bar, the uniformity which the Commission concluded was desirable is to be destroyed, it would follow that a claim may be settled either on the basis of value at place of origin, value at place of destination or value at place where damage occurred. The carrier would be free to settle with the inexperienced and unwary shipper on the basis least advantageous to him and, on the other hand, settle with a wise, a litigous or a favorite shipper on whichever basis would be most advantageous to him. Discrimination could be practiced—fair treatment could be thwarted. The subject

is one for the Commission's regulation in the first instance. That body has the power to make uniform rules. In this connection this court has said, in *Texas & Pacific Ry.* v. *American Tie & Timber Co.*, 234 U. S., 138, 146:

> "Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission."

In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S., 639, in dealing with the subject of agreed values, the court, at pages 650, 653, said:

> "the right of the carrier to adjust the rate to the valuation which the shipper places upon the thing to be transported is the very basis upon which a limitation of liability in case of loss or damage is rested. This is an administrative principle in rate making recognized as reasonable by the Interstate Commerce Commission and is the basis upon which many tariffs filed with the Commission are made. * * * That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. *Southern Cotton Oil Co.* v. *So. R. Co.*, 19 I. C. C., 79, *Miller & Lux* v. *So. P. Co.*, 20 I. C. C., 129."

There the court recognized that the administrative function of the Interstate Commerce Commission is called into action. The case at bar is more clearly within the administrative field of the Commission, since it presents no issue of limiting liability but only the object of preserving uniformity and preventing discrimination in the relations between shippers and carrier.

The provision of the bill of lading here in issue, published in Western Classification No. 55, R. C. Fyfe, I. C

C. No. 13, and antecedent issues, does not reduce the measure of the carrier's liability for loss and damage. In many instances the value at the time the shipment is at point of origin is greater than at the time it reaches destination. This is nearly always true where the market at point of destination has been declining during the period the shipment is in transit. The opposite would be true if that market had been advancing during the time the shipment was in transit. In all cases where there is neither advance nor decline of market during the period of transit the value at point of destination, less transportation charges, is substantially the same as the value at point of origin. Under the reasoning of the Circuit Court of Appeals the carriers must not attempt uniformity in any way. For, if the carrier may not prescribe origin value as basic, for the same reason it cannot provide that destination value shall be basic. The reasoning of the Circuit Court of Appeals would also lead to the conclusion that the carriers may not lawfully provide that the weight of the shipment at point of origin shall govern as to the quantity shipped. Neither can the weight at destination be made basic under the theory of that decision. In short, the decision destroys the uniformity that is the fundamental purpose of the act and the uniformity which the carriers and the Commission have attempted to effect conformably with the spirit of the act and the language of Section 15 thereof. No reason of public policy is suggested that warrants the destruction of this desirable, and apparently lawful, uniformity.

We submit the Court of Appeals has evolved a strained and technical construction of a part of the statute that is neither in keeping with the purpose of the Act to Regulate Commerce, as a whole, nor supported by a sound public policy.

JURISDICTION OVER SUBJECT MATTER OF COMPLAINT LAY WITH THE INTERSTATE COMMERCE COMMISSION, NOT WITH THE DISTRICT COURT.

In *Decker & Sons* v. *M. & St. L. R. R. Co. et al.*, 55 I. C. C., 453, 455, the Commission said:

> "We entertain no doubt of our jurisdiction over the subject matter of these complaints which, as we understand it, do not extend to a request for an award of damages on account of loss and damage claims but merely ask that we construe and pass upon the reasonableness and propriety of defendants' bill of lading provisions with respect to such claims."

The McCaull-Dinsmore Company did not institute any proceeding before the Interstate Commerce Commission for the purpose of having the clause and tariff modified. The subject matter of the complaint was not presented to the Interstate Commerce Commission before court action was taken. Though there is involved the establishing of uniformity, standardizing of shipping contracts, prevention of discrimination, publication of tariffs and rate classifications and the application of tariff rules, the administration of which has been placed with the Commission by Congress, yet the complaint was taken direct to the District Court without preliminary action by the Commission.

In the *Minnesota Rate Cases*, 230 U. S., 352, 419, is the following regarding the Act to Regulate Commerce:

> "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to

undertake to pass upon the administrative questions which the statute has primarily confided to it."

In *Loomis* v. *L. V. R. Co.*, 240 U. S., 43, the shipper made claim against the carrier for lumber furnished to make grain doors or bulkheads for the carrier's car. Without preliminary resort to the Interstate Commerce Commission action was brought in the state court upon the theory that it was not a subject within the administrative functions of the Interstate Commerce Commission. At page 50 of that opinion the following language occurs:

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S., 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. Co.* v. *Puritan Coal Min. Co.*, 237 U. S., 128, 129; *Penna. R. R.* v. *Clark Bros. Coal Min. Co.*, 238 U. S., 469, 470.

If in respect to interstate business the courts of New York may determine, as original matters, ratemaking problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

III.

THE BILL OF LADING CLAUSE IN ISSUE IS IN CONFORMITY WITH THE DECLARED POLICY OF THE LAW.

The agreement between shipper and carrier that value at time and place of shipment shall be basic in computing loss and damage claims is strictly in accord with the declared policy of Section 20 of the Act to Regulate Commerce.

When the First Cummins Amendment was replaced by the Second Cummins Amendment (39 Stats., 441), for the purpose of making the policy of the law clearer and more readily understood, the following proviso was incorporated therein:

> "*Provided*, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value * * * agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released."

In the foregoing it will be seen that except as to ordinary live stock it is the policy of the law to allow the Commission to freely exercise its administrative functions in approving or disapproving provisions agreed to between the shipper and the carrier which are written in the bill of lading and are published for uniform ap-

plication in the tariffs. Acting clearly within the policy of the law as contained in the language quoted, the Interstate Commerce Commission, *In Re The Cummins Amendment*, 33 I. C. C., 682, 693, specifically considered the question whether carriers may lawfully provide in their tariffs that their liability shall be for the full value of the property at the time and place of shipment and the Commission announced its conclusion thus:

> "It is, therefore, believed, that the liability of carriers may be limited to the value of the property so classified and established as of the time and place of shipment."

On page 697 of the same report the Commission granted permission to the carriers to publish the tariff provisions sought.

In that connection the Commission said:

> "The necessity for revision of the bills of lading, live stock contracts and other similar contracts of carriage, as well as of certain parts of the carriers' classifications and rate schedules is manifest. * * * Such changes in classifications and rate schedules cannot be made upon statutory notice and become effective contemporaneously with the new law. Permission is, therefore, hereby given to carriers to make effective on June 2, 1915, upon not less than three days' notice to the public and to the Commission, given in the manner prescribed in the act and in the Commission's regulations, amendments to the classifications and rate schedules which eliminate provisions or rules that are in conflict with the terms of the new law, provided no such amendment has the effect of increasing any rate or charge for services."

The petitioner and other carriers, under the Commission's authorization above quoted, inserted in their tariffs and in their uniform bills of lading the provision that value at the time and place of shipment would be taken as basic in computing loss and damage. (Rec., 5-6.) The

carriers also observed the restriction in the last sentence of the above quotation that their charges should not have the "effect of increasing any rate or charge for services."

While the Second Cummins Amendment post-dated the action of the Commission here under discussion, it is to be noted that the Second Cummins Amendment was drafted in order to make the First Cummins Amendment less ambiguous and it is also to be noted that the Commission's action does not in any particular contravene the policy of the law as it is explicitly written in the Second Cummins Amendment. Moreover, the Commission's action does not contravene the policy of the common law as interpreted by this court in the case of *Adams Express Company* v. *Croninger*, 226 U. S., 491, where the court said, at page 510:

> "Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy."

IV.

LEGISLATIVE INTENT.

The legislative history of the First Cummins Amendment, as it is shown in the Congressional Record, makes clear that the law had its origin in the desire to terminate the practice of railroads of limiting their liability on shipments of ordinary live stock to a fixed arbitrary amount less than actual value.

The Committee on Interstate and Foreign Commerce, in reporting the bill to the House, said:

> "The committee believes that no valid reason exists for authorizing limitations of liability on the part of carriers in contracts for the shipment of ordinary live stock and if this legislation passes,

carriers will hereafter be required to respond in full amount of damages or injuries occasioned to ordinary live stock while being shipped in interstate commerce." (Report No. 1341, 63d Congress, 3d Session.)

Senator Cummins, author of the bill and a member of the Committee on Interstate and Foreign Commerce, in explaining the purpose of the measure to the Senate, said:

"The real necessity for the bill arises from the impositions that are now being practiced by the common carriers upon the shippers and owners of live stock in this country." (51 Congressional Record, 9622.)

The declared legislative purpose was to change certain conditions created by the Carmack Amendment as interpreted in *Adams Express Co.* v. *Croninger,* 226 U. S., 491, but not to further change conditions that existed prior to the Carmack Amendment.

In alluding to the result of this court's interpretation of the Carmack Amendment, Senator Cummins further said:

"In this bill we have tried to restore to the shippers of this country not all but a measure of the rights which they possessed and which they exercised prior to the passage of the Carmack Amendment, which inadvertently destroyed those rights." (51 Congressional Record, 9621.)

In connection with the foregoing it should be noted that the bill of lading provision regarding value at time and place of shipment was not a result of either the Carmack Amendment or the Croninger decision. It antedates them both.

See the case of *Inman & Co.* v. *Seaboard Air Line Ry. Co.,* 159 Fed., 960, 974, where, on a bill of lading issued in 1902, four years prior to the Carmack Amendment, the court said:

> "There is, moreover, a clause in the bill of lading which provides that the value of the goods lost or injured shall be 'computed at the value of the property at the place and time of shipment.' Such a clause has been held reasonable and has been uniformly sustained."

Senator Cummins explained that the rights of shippers which had been taken away by the Carmack Amendment were those contained in the provisions of statutes of the numerous states and in the common law which prevented a carrier from limiting its liability, and he added:

> "I am sure it was not in the mind of Congress, and certainly not in the mind of the Senator who offered the (Carmack) amendment, to make any change whatever in the law to which I have referred governing the extent of recovery." (51 Congressional Record, 9621.)

Speaking of the effect of the Carmack Amendment as interpreted by this court in *Adams Express Company* v. *Croninger*, 226 U. S., 491, Senator Cummins said the effect of the decision "is to destroy what has been, I was about to say from time immemorial, the law of the country controlling this subject, and to make it valid for railroad companies to limit their liability to a certain sum which may be named in the bill of lading." (51 Congressional Record, 9621.)

From the foregoing it is clear that the author of the bill had the intention of bringing about legislation which would prevent railroad companies from limiting their "liability to a certain sum which may be named in the bill of lading," and had particularly in mind shipments of ordinary live stock regarding which at that time carriers were using a bill of lading or shipping contract with a provision that their liability would be limited to the value specified by the shipper for the purpose of

obtaining one of two optional rates either of which was dependent upon the value declared by the shipper.

The objectionable shipping contracts applicable to shipments of ordinary live stock did not deal with value at time and place of origin but dealt with a fixed, specific, arbitrary figure of value definitely written into the contract as a positive limitation of liability.

On June 9, 1914, the bill was introduced in the House and referred to the Committee on Interstate and Foreign Commerce. (51 Congressional Record, 10089.) That committee reported it to the House on February 1, 1915, and in its report explained the object of the bill in quite the same way that Senator Cummins had explained it in the Senate. The report reads in part as follows:

> "While at common law common carriers could not escape the consequence of their negligence by stipulating for a release of liability, either in whole or in part, yet the common law, as interpreted by the Supreme Court of the United States and by the Appellate Courts of some states, recognized as valid agreements between shippers and common carriers limiting the liability of the carrier to an agreed amount * * * The committee believes that no valid reason exists for authorizing limitations of liability on the part of carriers in contracts for the shipment of ordinary live stock, and if this legislation passes, carriers will hereafter be required to respond in full amount of damages or injury occasioned to ordinary live stock while being shipped in interstate commerce, such property being expressly exempt from the provision authorizing the Interstate Commerce Commission to establish rates based on value whereby recovery is limited to a declared value. It is believed that the effect of this legislation will be to establish natural, reasonable and just rules governing the liability of carriers for loss or damage to property caused by their negligence." (Report No. 1341, 63d Congress, 3d Session.)

From the last sentence quoted above it is clear the

committee contemplated that it would be permissible under this law "to establish natural, reasonable and just rules governing the liability of carriers for loss or damage to property caused by their negligence."

We submit it cannot be fairly contended that a rule making the actual value at time and place of shipment the basis for computing loss and damage claims is unnatural, unreasonable or unjust.

On January 5, 1916, Senator Cummins introduced the Second Cummins Amendment. (53 Congressional Record, 492.) On August 11, 1916, the Second Cummins Amendment became a law. (53 Congressional Record, 12481.)

During the whole period between the enactment of the First Cummins Amendment and the enactment of the Second Cummins Amendment the carriers had in their bills of lading, and in their published tariffs, the provision that value at the time and place of shipment would be made the basis of computation in settling loss and damage claims. Yet, it was not suggested in the discussion of the Second Amendment that this clause was objectionable, nor was there any language inserted in the Second Cummins Amendment to prevent the continuation of this method of arriving at actual value as prescribed in the carriers' bills of lading. On the contrary, Senator Cummins said:

> "This bill is intended to meet the views of the Interstate Commerce Commission and others who are interested in the subject." (53 Congressional Record, 9245.)

The views of the Interstate Commerce Commission, to which he alluded, are contained in the Commission's opinion in the case entitled, "*In re the Cummins Amendment*," 33 I. C. C., 682, where, at page 693, the Com-

mission, in concluding its report on the subject of this clause, said:

> "It is, therefore, believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

We submit the Circuit Court of Appeals has given the First Cummins Amendment a construction that is neither within the legislative intent nor the literal terms of the act.

Respectfully submitted,

H. H. Field,
O. W. Dynes,
F. W. Root,
Counsel for Chicago, Milwaukee & St. Paul Railway Company, Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

H. H. FIELD,
O. W. DYNES,
F. W. ROOT,
Attorneys for Petitioner.

BURTON HANSON,
Of Counsel.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

List of Cases Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This action was brought in the District Court of the United States for the District of Minnesota by McCaull-Dinsmore Company, respondent here, to recover from petitioner, Chicago, Milwaukee & St. Paul Railway Company, two hundred twenty-one dollars and sixty-three cents ($221.63) with interest, as a part of the damages occasioned by the loss in transit of a carload of wheat shipped by the Three Valley Co-operative Association

from Three Forks, Montana, to Omaha, Nebraska, consigned to respondent.

The jurisdiction of the District Court was invoked upon the ground that the alleged cause of action arose under the Act of Congress of March 4, 1915 (38 Stat., 1196), known as the First Cummins Amendment. The shipment was delivered to petitioner on November 17, 1915, a date subsequent to the effective date of the First Cummins Amendment.

At the time petitioner received the shipment it executed with the consignor, the Three Valley Co-operative Association, a shipping contract of the character commonly known and referred to as the "Uniform Bill of Lading" (Trans., 5), which contained the following:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." (Trans., 5.)

The same clause was carried in the published tariffs of the petitioner on file with the Interstate Commerce Commission and in effect at the time the shipment moved (Trans., 5.)

One important feature of the case is concisely set forth in the stipulation of facts (Trans., 5) thus:

> "That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided among other things, a rate of transportation based on and controlled by said bill of lading or contract and said tariff further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs."

Prior to the institution of the suit, petitioner admitted the loss and admitted its liability therefor to respondent

as the party entitled to recover "the value of the property at the place and time of shipment" and petitioner paid to respondent an amount representing such value, namely: One thousand, two hundred and 48/100ths dollars. (Trans., 6.) Respondent claimed that under the First Cummins Amendment it was entitled to receive the value of the wheat "at the time and place of destination when it should have been delivered there" with interest less freight charges. (Trans., 6.) The amount sued for is the difference between the amount claimed by respondent and the amount paid by petitioner. (Trans., 8.)

Thus the central issue presented here is whether value "at the place and time of shipment" should govern in computing the amount of loss or damage for which the interstate common carrier by rail is liable when the shipment is lost or damaged in transit.

The cause was tried in the District Court upon a stipulation of facts (Trans., 5) and that court found in favor of respondent. (252 Fed. Rep., 664.) Judgment was entered for the amount claimed, with interest, on August 23, 1918. (Trans., 8.) Petitioner sued out a writ of error from the Circuit Court of Appeals to review such judgment, and after a hearing in that court, the judgment was affirmed (260 Fed. Rep., 835) on September 22, 1919. (Trans., 17, 18.)

A petition for a writ of certiorari was granted by this court on January 26, 1920. On March 15, 1920, upon the application of petitioner, joined in by the Solicitor General on behalf of the Interstate Commerce Commission and by the General Solicitor for the United States Railroad Administration, this court advanced the cause on its docket.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Circuit Court of Appeals erred in holding and adjudging that the provision of the shipping contract entered into by petitioner and the consignor of the shipment that loss and damage should be computed on the basis of the value of the property at the place and time of shipment, was invalid.

II.

The Circuit Court of Appeals erred in holding and adjudging that petitioner's duly published tariff, on file with the Interstate Commerce Commission and in effect when the shipment in question moved, was unlawful to the extent that it provided that loss and damage should be computed on the basis of the value of the property at the place and time of shipment.

III.

The Circuit Court of Appeals erred in construing the First Cummins Amendment as abrogating the rule of law established by those decisions of this court that sustain the principle of the clause in the bill of lading and tariffs of petitioner which provides that loss and damage should be computed on the basis of the value of the property at the place and time of shipment and the Circuit Court of Appeals erred in concluding that because of said amendment carriers may no longer, by agreement with shippers written in bills of lading, provide that the amount

of the loss and damage shall be computed on the basis of the value at place and time of shipment.

IV.

The Circuit Court of Appeals erred in holding and adjudging that the provision of the shipping contract, entered into between petitioner and the consignor of the shipment, that loss and damage should be computed on the basis of the value of the property at the place and time of shipment, was an unlawful limitation of the carrier's liability.

V.

The Circuit Court of Appeals erred in holding and adjudging in substance that the action of the Interstate Commerce Commission of May 7, 1915, (*In re Cummins Amendment*, 33 I. C. C., 682, 693, 697) approving the tariff and bill of lading provision that loss and damage should be computed on the basis of the value of the property at the place and time of shipment, was without authority of law and without effect.

VI.

The Circuit Court of Appeals erred in holding and adjudging in substance that the Interstate Commerce Commission is without statutory authority to bring about uniformity in the treatment of various shippers by carriers with respect of the time and place that shall be regarded as controlling in computing the value of shipments lost or damaged in transit.

VII.

The Circuit Court of Appeals erred in holding and adjudging in substance that no specific time and place, fixed by the carrier in its lawfully published tariffs, approved by the Interstate Commerce Commission, and in its bill of lading contract, agreed to by the consignor can be treated as a valid and lawful basis for computing the value of a lost or damaged shipment.

BRIEF OF ARGUMENT.

I.

AT COMMON LAW THE CARRIER AND SHIPPER WERE PERMITTED TO FIX BY MUTUAL AGREEMENT A BONA FIDE VALUE TO GOVERN IN COMPUTING LOSS OF OR DAMAGE TO A SHIPMENT.

In the absence of contract provision, the general rule at common law was that damages for loss of or injury to a shipper's property, while in the possession of a common carrier, should be computed upon the basis of its market value at the place where and the time when the shipment should have been delivered.

M. & M. Ry. Co. v. *Jurey*, 111 U. S., 584, 596.
N. Y., L. E. & W. R. Co. v. *Estill*, 147 U. S., 591, 617.
The Oneida, 128 Fed., 687, 692.
Inman & Co. v. *S. A. L. Ry. Co.*, 159 Fed., 960, 974.

In *Springfield Light, Heat & Power Co.* v. *N. & W. Ry. Co.*, 260 Fed., 254, where the common-law aspect of the case was argued as it was in the lower courts in the case at bar, the court, at page 261, said:

> "The question raised by the demurrer to the third defense is whether or not, for those six cars, the defendant must pay their value at the time and place of delivery or their value at destination; the former value being alleged to be less than the latter.
>
> (2) This demurrer will be overruled, also, for the reason that the published terms of defendant's coal tariffs in effect at the time, filed with the Interstate Commerce Commission and published according to law, fix the measure of damage for loss or damage on the basis of the value of the property at the place and time of shipment. Of course, the tariff rates are

measured by the value of the service. The published rate is on the basis of the value of the coal at the mine. A greater value than that would call for a higher rate than the published rate. To permit the plaintiff to recover for a greater value than at the mine, while paying the same rate as other shippers, would be a discrimination in favor of the plaintiff.

The subject was dealt with in *Shaffer* v. *Ry. Co.*, 21 I. C. C., 8. In that case the bill of lading contained an agreement the effect of which was substantially the same with respect to the amount of loss or damage, and fixing it as of the value of the property at the place and time of shipment. In the report of the Commission in that case it was said:

'The contract complained of admittedly changes the common-law rule which makes the carrier liable for the value of the property at the place of destination.' "

The common law distinctly recognized a legal right in the carrier to fix by contract with the shipper a *bona fide* value on the goods to be shipped and the common law made such value conclusive on the owner of the shipment.

B. & M. R. R. v. *Piper*, 246 U. S., 339, 343.

Hutchinson on Carriers, 3rd Edition, Vol. I, Sec. 426.

Alair v. *Nor. Pac. R. Co.*, 53 Minn., 160.

Hart v. *Pa. R. R. Co.*, 112 U. S., 331.

At page 343 of the latter authority is the following:

"Where a contract, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he received, and of protecting himself against extravagant and fanciful valuations."

In *Adams Express Company* v. *Croninger*, 226 U. S., 491, at page 509, the court said:

"The rule of the common law did not limit his (the carrier's) liability to loss and damage due to his own negligence or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants."

See, also:

Brown v. *Steamship Co.*, 147 Mass., 58.
Jennings v. *Smith*, 106 Fed., 139.
Macfarlane v. *Express Co.*, 137 Fed., 982.
The Koan Maru, 251 Fed., 384.
Graves v. *R. R. Co.*, 137 Mass., 33.
Couplane v. *R. R. Co.*, 61 Conn., 531.
Douglass v. *Minn. Transfer Ry. Co.*, 30 L. R. A., 860.
Oppenheimer v. *U. S. Express Co.*, 69 Ill., 62.
Adams Express Co. v. *Carnahan*, 29 Ind. App., 606.
Harvey v. *Terre Haute R. R. Co.*, 74 Mo., 583.
Magnin v. *Dinsmore*, 56 N. Y., 168.
Hubbard v. *R. R. Co.*, 72 Ohio, 302.
Ullman v. *Ry. Co.*, 112 Wis., 168; 56 L. R. A., 246.

II.

UNDER THE CARMACK AMENDMENT THE CARRIER AND SHIPPER WERE PERMITTED TO FIX BY MUTUAL AGREEMENT A BONA FIDE VALUE TO GOVERN IN COMPUTING LOSS OF OR DAMAGE TO THE SHIPMENT.

Under the Carmack Amendment of June 26, 1906, to Section 20 of the Act to Regulate Commerce (34 Stat. at L., 593) this court held it to be in keeping with the purpose of that law and its policy for the carrier and the shipper to be committed by the agreed terms of the bill of lading to a *bona fide* value of the shipment and this, notwithstanding the provision in the Carmack Amendment that "no contract, receipt, rule or regulation shall exempt such common carrier" from liability to the shipper of the property "for any loss, damage or injury to such property caused by it."

Adams Express Company v. *Croninger*, 226 U. S., 491.

Wells Fargo & Co. v. *Neiman-Marcus Co.*, 227 U. S., 469.

C. St. P. M. & O. Ry. Co. v. *Latta*, 226 U. S., 519.

C. B. & Q. R. Co. v. *Miller*, 226 U. S., 513.

III.

THE FIRST CUMMINS AMENDMENT IS NOT ESSENTIALLY DIFFERENT FROM THE CARMACK AMENDMENT IN RESPECT OF LIMITATIONS ON LIABILITY.

There is no material difference between the law as it was written in the Carmack Amendment and the law as it was written in the First Cummins Amendment so far as is concerned an agreement between the shipper and the carrier that value of the property at place and time of

shipment shall govern in computing loss or damage occurring in transit.

The Carmack Amendment contained the provision that the carrier should be liable to the lawful holder of the bill of lading for any loss, damage or injury. The First Cummins Amendment, while retaining the foregoing, made similar provision in favor of "any party entitled to recover" and used the expression "full actual loss" where the Carmack Amendment used the expression "any loss."

See:

34 Stat. at L., 593.
38 Stat. at L., 1196.

See also page 32, *post*, for comparison and contrast of provisions of those two laws.

IV.

THE IMPORTANCE OF A UNIFORM BILL OF LADING AND UNIFORM TREATMENT OF SHIPPERS' CLAIMS.

The petitioner held open to the consignor of the shipment in question, at the time the shipment was billed, the privilege of forwarding it under either of two arrangements, (Trans., 5) namely:

(1) The uniform bill of lading, or

(2) An arrangement which excluded the clause here in dispute and left the consignor in possession of all rights a shipper had at the common law in absence of modifying contract.

This second arrangement was provided for in the tariffs then in effect in the following language:

> "Property carried not subject to all the terms and conditions of the uniform bill of lading will be at

> the carrier's liability, limited only as provided by common law and by laws of the United States and of the several states in so far as they apply; but subject to the terms and conditions of the uniform bill of lading in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be ten per cent (10%) higher (subject to a minimum increase of one (1) cent per one hundred pounds) than the rate charged for property shipped subject to all the terms and conditions of the uniform bill of lading."

The foregoing clause is legally cited as follows: Western Classification No. 53, I. C. C. No. 11, effective Feb. 20, 1915, Rule 9, paragraph "D," page 9, and is the clause referred to in the stipulation of facts (Trans., 5) in these words:

> "Said tariff further provided that in case where the shipper was not agreeable to shipping under the terms of said contract or bill of lading then a higher rate of transportation was provided by said tariffs."

The consignor's election was in favor of the uniform bill of lading which gave him the benefit of the lower rate.

To secure uniform treatment by carriers of all shippers was a fundamental purpose of the Act to Regulate Commerce.

> 24 Stat. at L., 380, Sec. 3.
>
> 34 Stat. at L., 595, Sec. 20.
>
> *Adams Express Company* v. *Croninger*, 226 U. S., 491.

At page 505 of the latter citation is the following:

> "The congressional action has made an end to this diversity, for the National law is paramount and supersedes all State laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law."

And at page 506:

> "The duty to issue a bill of lading and the liability

thereby assumed are covered in full. * * * It is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

The shipping contract involved in the case at bar eliminated diversity of treatment and carried a uniform rule. It was known as the "Uniform Bill of Lading." (See Para. 5 of Stipulation of Facts, Trans., 5.)

The Interstate Commerce Commission has been persistent in bringing about the uniformity that is established in the uniform bill of lading containing the clause here in controversy. In *In the Matter of Bills of Lading,* 14 I. C. C., 346, 349, 350, the Commission said:

> "We, therefore, assume that the railroads in Official Classification territory, whose proposed action was the subject of the original investigation, will adopt and use this bill, to the extent above indicated, * * * We shall also expect that railroad carriers subject to the act outside of Official Classification territory will adopt and use this bill of lading to the same extent and from and after the same date. * * * The desirability of uniform usage is so great and the reasons for it so obvious as to justify the expectation that carriers in western and southern territory will adopt the bill in question to the fullest extent practicable without abridging any just privileges which the shippers now enjoy. Accordingly, the Commission hereby gives approval to the bill of lading annexed to this report. * * *"

What is quoted above was reiterated by the Commission in *Shaffer & Co.* v. *C. R. I. & P. Ry. Co.*, 21 I. C. C., 8, at page 11.

To insure uniformity and to eliminate diversity of treatment of shippers the Uniform Bill of Lading (carrying the provision that loss or damage should be computed on the basis of the value of the property at place

and time of shipment) was published in the carriers' tariffs on file with the Interstate Commerce Commission. (See Para. 4 of Stipulation of Facts, Trans., 5.)

See also *In re Cummins Amendment*, 33 I. C. C., 682, 693, from which the following is quoted:

> "2. May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?
>
> It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations.
>
> The Cummins Amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

V.

THE INTERSTATE COMMERCE COMMISSION ACTED WITHIN ITS ADMINISTRATIVE AUTHORITY, DELEGATED BY CONGRESS, IN APPROVING THE CLAUSE OF THE UNIFORM BILL OF LADING HERE IN CONTROVERSY.

In *Loomis* v. *L. V. R. R. Co.*, 240 U. S., 43, 50, is the following:

> "Ample authority has been given the Commission in circumstances like those here shown to administer proper relief and in connection therewith to approve some general rule of action."

The Interstate Commerce Commission acted within its lawful administrative functions in approving the classification, practice and the bill of lading by which the carriers provided that value at place and time of shipment would govern in the settlement of loss and damage claims.

Section 15 of the Act to Regulate Commerce, as amended, contains the following:

> "The Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation or practice is just, fair and reasonable to be thereafter followed."

Pursuant to the foregoing authority, the Commission, in *In re Cummins Amendment*, 33 I. C. C., 682, considered substantially the central question presented in this case and at page 693 announced its conclusions as follows:

> "2. May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?
>
> It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the mean-

ing of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations.

The Cummins amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

VI.

THE COURTS HAVE NOT BEEN GIVEN JURISDICTION TO NULLIFY PURELY ADMINISTRATIVE ACTION LAWFULLY TAKEN BY THE INTERSTATE COMMERCE COMMISSION.

Where, as in this case, the Interstate Commerce Commission has approved a "practice" and a classification initiated by the carriers for the purpose of bringing about just and reasonable uniformity, this court will not by decision nullify such administrative action on the part of the Commission.

In *Mitchell Coal & Coke Company* v. *Penna. R. Co.*, 230 U. S., 247, 255, the court said:

> "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts, with different juries, the results would not only vary in degree, but might often be opposite in character,—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

In this connection this court has said, in *Texas & Pacific Ry.* v. *American Tie & Timber Co.*, 234 U. S., 138, 146:

> "Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not, as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission."

In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S., 639, in dealing with the subject of agreed values, the court, at pages 650, 653, said:

> "the right of the carrier to adjust the rate to the valuation which the shipper places upon the thing to be transported is the very basis upon which a limitation of liability in case of loss or damage is rested. This is an administrative principle in rate making recognized as reasonable by the Interstate Commerce Commission and is the basis upon which many tariffs filed with the Commission are made. * * * That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. *Southern Cotton Oil Co.* v. *So. R. Co.*, 19 I. C. C., 79, *Miller & Lux* v. *So. P. Co.*, 20 I. C. C., 129."

Jurisdiction over the subject matter of the complaint in this case lay with the Interstate Commerce Commission, not with the District Court.

In *Decker & Sons* v. *M. & St. L. R. R. Co. et al.*, 55 I. C. C., 453, 455, the Commission said:

> "We entertain no doubt of our jurisdiction over the subject matter of these complaints which, as we understand it, do not extend to a request for an award of damages on account of loss and damage claims but merely ask that we construe and pass upon the reasonableness and propriety of defendants' bill of lading provisions with respect to such claims."

In the *Minnesota Rate Cases*, 230 U. S., 352, 419, is the following regarding the Act to Regulate Commerce:

> "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

In *Loomis* v. *L. V. R. Co.*, 240 U. S., 43, the controversy involved the practice of the carrier in restricting and limiting the amount that would be paid shippers for coopering grain cars.

At page 50 of the opinion the court said:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause pre-

sents a problem which directly concerns rate making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry.* v. *United States,* 232 U. S., 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. Co.* v. *Puritan Coal Min. Co.,* 237 U. S., 128, 129; *Penna. R. R.* v. *Clark Bros. Coal Min. Co.,* 238 U. S., 469, 470.

If in respect to interstate business the courts of New York may determine, as original matters, rate-making problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

VII.

THE BILL OF LADING CLAUSE IN CONTROVERSY IS IN CONFORMITY WITH THE DECLARED POLICY OF THE LAW.

When the First Cummins Amendment was replaced by the Second Cummins Amendment (39 Stat. at L., 441), the following language was incorporated, obviously for the purpose of making the policy of the law clearer and more readily understood:

> "*Provided, however,* that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly author-

> ized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value * * * agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released."

The clause in dispute was in accord with the policy of the law as expressed in the foregoing, since the clause was to "have no other effect than to limit liability and recovery to an amount not exceeding the actual, *bona fide* value at the place and time of shipment.

In *Adams Express Co.* v. *Croninger,* 226 U. S., 491, the court, at page 510, said:

> "Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy."

In *G. F. & A. Ry. Co.* v. *Blish Milling Co.,* 241 U. S., 190, and in *Texas & Pacific Ry. Co.* v. *Leatherwood,* 250 U. S., 478, this court has considered and sustained the right of the carrier and shipper to contract to the effect that the carrier may escape liability if written notice of claim is not filed within six months or if suit is not filed within two years and Congress, in the Transportation Act of 1920, has given its approval to similar limitations. The clause in controversy is far less a limitation than the conditions approved in the authorities last cited.

VIII.

LEGISLATIVE INTENT.

It was not the intent of the legislature to destroy the uniformity which the Interstate Commerce Commission approved in the uniform bill of lading used by the car-

riers and published to the world in their tariffs on file with the Commission.

In debating the Second Cummins Amendment, Senator Cummins said:

> "This bill is intended to meet the views of the Interstate Commerce Commission and others who are interested in the subject." (53 Congressional Record, 9245.)

It was the requirements of live stock shipments and not those of grain or merchandise shipments that brought about the First Cummins Amendment.

The Committee on Interstate and Foreign Commerce, in reporting the bill to the House, said:

> "The committee believes that no valid reason exists for authorizing limitations of liability on the part of carriers in contracts for the shipment of ordinary live stock and if this legislation passes, carriers will hereafter be required to respond in full amount of damages or injuries occasioned to ordinary live stock while being shipped in interstate commerce." (Report No. 1341, 63rd Congress, 3d Session.)

Senator Cummins, author of the bill and a member of the Committee on Interstate and Foreign Commerce, in explaining the purpose of the measure to the Senate, said:

> "The real necessity for the bill arises from the impositions that are now being practiced by the common carriers upon the shippers and owners of live stock in this country." (51 Congressional Record, 9622.)

The declared legislative purpose was to change certain conditions created by the Carmack Amendment as interpreted in *Adams Express Co.* v. *Croninger*, 226 U. S., 491, but not to further change conditions that existed prior to the Carmack Amendment.

In alluding to the result of this court's interpretation of the Carmack Amendment, Senator Cummins further said:

> "In this bill we have tried to restore to the shippers of this country not all but a measure of the rights which they possessed and which they exercised prior to the passage of the Carmack Amendment, which inadvertently destroyed those rights." (51 Congressional Record, 9621.)

In connection with the foregoing it should be noted that the bill of lading provision regarding value at time and place of shipment was not a result of either the Carmack Amendment or the Croninger decision. It antedates them both.

See the case of *Inman & Co.* v. *Seaboard Air Line Ry. Co.*, 159 Fed., 960, 974, where, on a bill of lading issued in 1902, four years prior to the Carmack Amendment, the court said:

> "There is, moreover, a clause in the bill of lading which provides that the value of the goods lost or injured shall be 'computed at the value of the property at the place and time of shipment.' Such a clause has been held reasonable and has been uniformly sustained."

That the legislative intent in enacting the First Cummins Amendment did not contemplate making it unlawful for a carrier and shipper to contract that value at place and time of shipment should govern in computing the amount of loss or damage sustained by the shipment is clearly evidenced by the provision in the Second Cummins Amendment expressly permitting such contracts on all commodities, excepting only live stock, (39 Stat. at L., 441) and it is further clearly evidenced by the fact that when Congress again amended Section 20 of the Act to Regulate Commerce by the Transportation Act of 1920 it left unimpaired the right to freely contract on this subject.

ARGUMENT.

I.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

It is fitting to say at the outset that the opinion of the Circuit Court of Appeals of the Eighth Circuit, rendered in this case, creates a conflict of decisions in the federal courts in that it is opposed to the decision of the District Court of the Southern District of Ohio, Western Division, rendered June 11, 1919, in *Springfield Light, Heat and Power Company* v. *N. & W. Ry. Co.*, 260 Fed., 254, 261. The opinion of the District Court in the case at bar and the First Cummins Amendment, though not dwelt upon in his opinion, were before the Ohio jurist when he rendered his decision.

The case at bar, while involving a small sum of money, is a test case, the decision of which by this court will control the disposition of a vast number of outstanding claims of shippers against carriers the aggregate number being in the hundred thousands—the money values of which are correspondingly vast. The seriousness of the conflict of federal court decisions is manifest.

The Circuit Court of Appeals, in deciding this case, (260 Fed., 835) said:

> "The sole question here presented is whether the origin value or the destination value should govern where the shipment was under such a form of interstate bill of lading." (Trans., 17.)

And that court decided that the clause of the bill of lading was illegal which contained the provision:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis

of the value of the property at the place and time of the shipment." (Trans., 7.)

In substance that court held a similar clause, providing that destination value should govern, would be lawful.

The reasoning of the court can be clearly discerned and readily followed to the conclusion which the opinion contains.

The first premise on which the conclusion is based is:

"There was no uncertainty as to the time or place of estimating value under the rule of common law—it was destination." (Trans., 18.)

This premise, we submit, misleads. The court, in adopting the quoted premise as absolute, overlooked the important common-law exception, nearly as broad as the general rule, namely: that destination value would not control where the carrier and shipper had by a *bona fide* contract fixed a different value, reasonable and fair in itself.

In *Hart* v. *Penn. R. Co.*, 112 U. S., 331, where a somewhat similar question was before the court for determination according to common-law principles, the court at page 338, said:

"It is the law of this court that a common carrier may by special contract limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants."

The element of negligence is not involved in the case at bar. This court has disposed of the negligence feature in this character of contract by its decision in *Adams Express Co.* v. *Croninger*, 226 U. S., 491, 511, where it adopts the following language of the opinion in *Bernard* v. *Adams Express Co.*, 205 Mass., 254, to wit:

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the

meaning of the Statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him."

And on page 512 this court, after citing supporting authority, concluded as follows:

> "That a carrier rate may be graduated by value, and that a stipulation limiting recovery to an agreed value, made to adjust the rate, is recognized by the Interstate Commerce Commission, see *Re Released Rates*, 13 I. C. C. Rep., 550.
>
> We, therefore, reach the conclusion that the provision of the Act forbidding exemptions from liability imposed by the Act is not violated by the contract here in question."

Dealing with the common law rule in the *Croninger Case, supra*, the court, at page 509, said:

> "The rule of the common law did not limit his (the carrier's) liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants."

The second premise in the reasoning of the court below is thus stated in its opinion:

> "The evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law for the obvious object of escaping a higher valuation which would often arise at destination." (Trans., 18.)

We submit the foregoing is unsound. It assumes that the fluctuations in wheat values are more often upward than downward. The court overlooks the obvious fact that if fluctuations in wheat values are as often down-

ward as upward, the value of wheat on the day and at the place shipped is as often above as it is below the destination market value, freight charges excluded.

In *Shaffer & Co.* v. *C. R. I. & P. Ry. Co.*, 21 I. C. C., 8, the Commission, in this connection, at page 12, said:

> "Moreover, it must be remembered that although the rule works to the advantage of the carrier when the market price has advanced subsequent to the date of shipment, it benefits the shipper in case the market price at destination should decline; and it seems fairly probable that in the long run the rule would be of advantage to the shipper as often as it is to the carrier."

Under these circumstances it would seem to follow that if the clause had prescribed destination value instead of point of origin value, the court below could have said with as much truth that the object of the carrier was to avoid point of origin value which is often higher than destination value, freight charges deducted. In any event, it must be clearly apparent that there is not a syllable in the evidence of record to indicate that the carriers were speculating on the fluctuations of the wheat market when they determined to insert point of origin value in their tariff and uniform bill of lading instead of destination value.

In the clause last quoted the court below said:

> "The evident purpose of the provision in the bill of lading was not to introduce certainty."

We deny the soundness of this statement and assert it is not based on any fact or circumstance of record.

If the clause had been left out entirely, then who could say what value would be basic in adjusting loss or damage. One contention might be for point of origin value on the day it was shipped; another for value on the day and at the place where the loss occurred; another, the destination value on the date the shipment actually ar-

rived; another the destination value on the date the shipment should have arrived. Shippers and carriers would clearly be without certainty under such circumstances. An overreaching party would endeavor to deal differently than a fair-minded party. Uniformity of treatment by carriers of shippers could not, under such circumstances, be reasonably hoped for.

Obviously, the court overlooked the fact that an infinite variety of articles are shipped under this uniform bill of lading which have a fixed invoice price at point of origin, affording a fair gauge of value, but have no fixed market at destination by which to gauge value there.

While the court below gave as its interpretation of the practical effect of the clause that it was not in the way of an effort to establish uniformity, the Interstate Commerce Commission, in passing upon the same question of the practical effect of the same clause, said:

> "It is urged that this rule would relieve the question of the amount of liability from uncertainty and would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations * * * the loss or damage must apparently be either as of time and place of shipment, time and place of the loss or damage, or time and place of destination. * * * It is, therefore, believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment." (*In Re Cummins Amendment*, 33 I. C. C., 682, 693.)

The conclusion of the court below is in substance that Congress intended that no value other than destination value should govern and intended to declare a policy of law opposed to fixing value at time and place of ship-

ment by mutual agreement between shipper and carrier. On this conclusion of the court we offer two comments:

(1) If such was the purpose of Congress, why was it not so expressed in the law by apt words and clear terms?

(2) If such a policy of the law was intended, why was that policy radically changed by the Second Cummins Amendment (39 Stat. at L., 441) which in express terms permits carriers and shippers to freely contract regarding the recoverable value of all kinds of property shipped, except ordinary live stock.

It is apparent the Circuit Court of Appeals missed the distinction between agreements limiting liability, at which the First Cummins Amendment was aimed, and agreements by which actual value is arrived at without impinging on the question of liability.

For the court's consideration in passing upon the conflict of opinions between the Circuit Court of Appeals in the case at bar and the District Court of the Southern District of Ohio, Western Division, we wish to direct attention to the following, quoted from the opinion of that District Court:

> "The question raised by the demurrer to the third defense is whether or not, for those six cars, the defendant must pay their value at the time and place of delivery or their value at destination; the former value being alleged to be less than the latter.
>
> (2) This demurrer will be overruled, also, for the reason that the published terms of defendant's coal tariffs in effect at the time, filed with the Interstate Commerce Commission and published according to law, fix the measure of damage for loss or damage on the basis of the value of the property at the place and time of shipment. Of course, the tariff rates are measured by the value of the service. The published rate is on the basis of the value of the coal at the mine. A greater value than that would call for a higher rate than the published rate. To permit the plaintiff to recover for a greater value than at the

mine, while paying the same rate as other shippers, would be a discrimination in favor of the plaintiff.

The subject was dealt with in *Shaffer* v. *Ry. Co.*, 21 I. C. C., 8. In that case the bill of lading contained an agreement the effect of which was substantially the same with respect to the amount of loss or damage, and fixing it as of the value of the property at the place and time of shipment. In the report of the Commission in that case it was said:

'The contract complained of admittedly changes the common-law rule which makes the carrier liable for the value of the property at the place of destination.'" (Quoted from *Springfield Light, Heat & Power Company* v. *N. & W. Ry. Co.*, 260 Fed., 254, 260.)

II.

IT IS LIMITATION OF LIABILITY AND NOT AGREEMENT AS TO BONA FIDE VALUE THAT IS OBNOXIOUS TO THE LAW.

A contention of opposing counsel in the courts below was to the effect that the Cummins Amendment gave the middleman and subsequent dealers and jobbers the right to claim anticipated profits in addition to the point of origin value of the shipment.

We feel this contention is sufficiently answered by pointing to the language of the law which contemplates loss of the "property" or damage to the "property" and does not contemplate loss of the anticipated profits of merchandisers or speculators who would have dealt in the lost or damaged shipment had it reached destination in good condition.

In *Bowman-Kranz L. Co.* v. *Bush*, 176 N. W., 91, decided by the Supreme Court of Nebraska within the past few weeks, is the following:

"The case submitted is on an agreed state of facts. The sole question to be determined is whether the value at the place of shipment or at the place of

> destination should govern in computation of damages. We conclude that under the facts here presented and the authorities, the former should govern. Defendant relies upon the uniform bill of lading to sustain its contention. * * * Plaintiff argues that the provision in question is an attempt to limit the liability of the carrier for negligence and that it is, therefore, void under the Cummins Amendment to the Interstate Commerce Act. The recent decisions seem to hold otherwise. This provision has been construed and held by the Interstate Commerce Commission and by the federal and state courts to be a reasonable rule by which to determine the value of the shipment in case of loss and that it is not a limitation of the carrier's liability for negligence. * * * Under the Cummins Amendment it has been upheld, *In re Cummins Amendment,* 33 I. C. C., 682, at page 693. Some of the authorities point out that the rule is salutary, in that the invoice value of the shipment, with freight added, where it has been prepaid, can be readily ascertained, and that prompt settlement can be made by the parties without resort to tedious and expensive litigation."

The foregoing contains a very fair outline of the purpose and of the legal effect of the clause in question. The decision is in striking contrast, both in reasoning and conclusion, to the decision of the Circuit Court of Appeals, though the facts in the two cases are essentially the same.

The Nebraska Supreme Court has taken cognizance of these features that the Circuit Court of Appeals disregarded in the case at bar, namely:

(a) That the clause has been construed as in keeping with good practice by the Interstate Commerce Commission.

(b) That the only unlawful agreements on value are those by which arbitrary, fictitious values are used to indirectly limit liability.

(c) That invoice value, or value at place and time of

shipment, can in general be determined more readily and more reliably than value at destination.

(d) That the clause is salutary in that it prevents tedious and expensive litigation and promotes prompt settlement of legitimate claims.

(e) That the regulation of the carrier's relation to the shipper in this connection should be entrusted, and may confidently be entrusted, to the Interstate Commerce Commission that has jurisdiction over the form of bills of lading and the practices of carriers.

(f) That the law was not intended to destroy the right of the carrier to fairly and lawfully contract to prevent wasteful and unnecessary litigations through creating an agreed standard by which actual value can be measured.

III.

THE TERM "ACTUAL LOSS" AS USED IN THE CUMMINS AMENDMENT.

So far as the present case is concerned, the Cummins Amendment differed from the preceding law, known as the Carmack Amendment, in only two particulars, namely:

(1) The term "full actual loss" is used in the new language of the Cummins Amendment where the corresponding expression in the Carmack Amendment was "any loss."

(2) The Carmack Amendment confined the carrier's liability to the lawful holder of the bill of lading who might recover "any loss" (not due to the act of God or public enemy) while the Cummins Amendment created a similar liability in favor of "any party entitled to recover," to the extent of the "full actual loss."

McCaull-Dinsmore Company is not shown by the record to have been the holder of the bill of lading, which was issued to the Three Valley Co-operative Association, but was conceded to be the "party entitled to recover" thereon. Such rights as it claims in this case, therefore, are under the Cummins Amendment and claim is for "full actual loss." It is not a claim under the Carmack Amendment for "any loss."

So much of the First Cummins Amendment as is here material is set forth below, the portions italicized being the Carmack Amendment as originally enacted:

> "*That any common carrier, railroad, or transportation company* subject to the provisions of this act *receiving property for transportation from a point in one state* or territory or the District of Columbia *to a point in another state,* territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country *shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass* within the United States or within an adjacent foreign country when transported on a through bill of lading *and no contract, receipt, rule or regulation,* or other limitation of any character whatsoever, *shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed;* and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been

issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void. * * * *Provided* further, *That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law.*"

This amendment took effect June 2, 1915. There was a proviso (indicated by the stars) relating to goods hidden from view, etc., which is not involved in this case.

The value of a shipment at the time and place of shipment is not a speculative value or an estimated value, but is the actual value. Loss of or damage to a shipment computed on a basis of value at time and place of shipment is not a speculative loss or an estimated loss but the actual loss.

By the Carmack Amendment the carrier was made liable for "any loss, damage or injury" that might occur to the shipment. The First Cummins Amendment, as previously stated, differs from the Carmack Amendment in that it uses the term "full actual loss" instead of the term "any loss" and provides the carrier shall be liable to a "party entitled to recover" for "the full actual loss, damage or injury to the shipment notwithstanding any limitation of liability or limitation of the amount of recovery." The term "actual loss" was apparently used

in contradistinction from speculative loss and from estimated loss.

Under the term "any loss," used in the Carmack Amendment, a speculative loss or an estimated loss was included. Under the term "actual loss," of the First Cummins Amendment, they are excluded.

The clause of the bill of lading and of the tariff which provides that loss and damage shall be computed on the basis of value at time and place of shipment, clearly contemplates the payment of the "full actual loss" and clearly contemplates avoiding a speculative loss or an estimated loss.

Destination value of wheat is often highly speculative, due to fluctuations of terminal markets that cannot be foretold and due, sometimes, to other causes such as deterioration and shrinkage. At the time the bill of lading is executed destination value is a thing of the future and affords not an actual but a speculative basis of value. It seems clear that value at time and place of shipment means actual value and loss computed thereon means actual loss. If this reasoning is sound, it follows as a corollary that the clause of the bill of lading does not limit or restrict the loss or damage recoverable but, on the contrary, contemplates and requires the payment of the full actual loss and damage.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CONSTITUTES AN UNWARRANTED INVASION OF THE ADMINISTRATIVE FUNCTIONS OF THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission acted within its lawful administrative functions in approving the practice by the carriers of incorporating in their uniform bills of lading and in their tariffs and classifications the provision that value at the time and place of shipment would govern in the settlement of loss and damage claims.

Section 15 of the Act to Regulate Commerce, as amended, contained, among other things, the following:

> "The Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation or practice is just, fair and reasonable to be thereafter followed."

Pursuant to the authority contained in the foregoing quotation, the Commission entered upon a consideration of the reasonableness, fairness and justness of the joint classification, the uniform regulation and the uniform practice of the carriers with regard to providing in their bills of lading, joint classifications and tariffs that the value at time and place of shipment would govern in making settlements of shippers' loss and damage claims, except in instances where the shipper would elect to decline the contract and pay a rate ten per cent higher, applicable where common-law rules govern.

That proceeding is entitled, "*In re Cummins Amendment*," 33 I. C. C., 682. At page 693 the Commis-

sion, in concise language, states the question before it, its reasoning and its conclusions thereon, as follows:

> "2. May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?
>
> It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations.
>
> The Cummins Amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

The fundamental purpose of the Act to Regulate Commerce is to secure uniformity and eliminate discrimination in the treatment by carriers of matters arising between them and shippers. The action of the Interstate Commerce Commission, as evidenced by the language quoted above, was directed to that very end.

The Commission approved the practice of publishing to the world, through the carriers' joint classifications and tariffs, that all shippers' claims would be treated alike in respect of using the value at point of origin as basic in making settlement. A tariff was published and in effect at the time the shipment moved which recited the provision of the bill of lading under discussion. (Trans., 5.)

The subject of the uniform bill of lading has long received the administrative attention of the Interstate Commerce Commission.

In *In the Matter of Bills of Lading,* 14 I. C. C., 346, the Commission, in the year 1908, recommended the adoption of the uniform bill of lading and pointed out in its report that the subject had been under investigation since November 21, 1904.

At page 346 of the Commission's opinion cited above is the following:

> "This is a proceeding of investigation and inquiry instituted by the Commission on November 21, 1904. Shortly before that date numerous petitions were received from the Illinois Manufacturers' Association and other commercial organizations in Official Classification territory, complaining of the proposed adoption by railroad companies operating in that territory of certain changes in the so-called uniform bill of lading then generally used in the transportation of freight over their respective lines.
>
> To inform itself concerning the controversy brought to its attention by these petitions the Commission ordered an investigation, and the first hearing was had on the fifth and sixth days of December, 1904. It appeared at that time that the matters in question were the proper subject for negotiation and settlement between the various conflicting interests, and upon the suggestion of the Commission a joint committee of shippers and carriers was appointed to formulate a suitable bill of lading and report the same to the Commission. During the year 1906 and

> the first months of 1907 this committee held numerous conferences and gave to the subject most careful attention. On June 14, 1907, they made a report to the Commission and submitted a bill of lading which appears to have been agreed upon and consented to by the original petitioners and by substantially all carriers in Official Classification territory. The Commission was thereupon asked to approve this bill and direct its adoption."

The opinion continues with a recital of extended hearings and rehearings and protracted consideration given the subject, and concludes, at page 350, with the following:

> "Accordingly the Commission hereby gives approval to the bill of lading annexed to this report and made a part thereof, * * * It should be distinctly understood that this approval does not imply acceptance by the Commission of any construction of the Carmack Amendment at variance with its apparent purpose and intent, nor will the general recommendation now made preclude the Commission from passing independent judgment upon any provision of this bill of lading which may be drawn in question in future proceedings."

Subsequently, in the year 1911, the subject was again before the Commission with special reference to the clause here involved, or its legal equivalent. This is in the case of *Shaffer & Company* v. *C. R. I. & P. Ry. Co.*, 21 I. C. C., 8.

That the Commission directly confronted in its administrative capacity the question involved in the case at bar is apparent from the following, quoted from page 9 of the decision:

> "The defendant does not deny its liability for the conversion of the car, the only matter at issue being the measure of damages. The complainant contends that it is entitled to the value of the car of wheat at Chicago as evidenced by the market price it was compelled to pay to fill its contract. The defendant takes the position that by reason of a provision in the

bill of lading, signed by the shipper and the agent of the company, the measure of damages is the invoice price of the wheat, namely, 99½ cents per bushel.

The provision of the uniform bill of lading in controversy reads as follows:

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, * * *."

At page 12 of its opinion is developed very clearly why the subject is one for the administrative function of the Interstate Commerce Commission:

"The condition complained of is a contract which must be, and was in this case, signed by the shipper and the agent of the company at the place of shipment. This contract makes no attempt to exempt the carrier from liability for the full value of the commodity transported, nor does it in any way limit the carrier's liability to a sum less than the value of the commodity. It is merely a contract between the parties fixing the time, place, and manner of arriving at the value of the property. The aim of all general rules of transportation ought to be to secure equitable treatment of the shipper and the carrier and to promote expeditious service and prompt settlement of controversies arising between them. The contract complained of admittedly changes the common-law rule which makes the carrier liable for the value of the property at the place of destination. Under the conditions existing when the common-law rule was formulated, and in view of the liability of the carrier as an insurer, and the facilities then used in transportation, the rule may have been satisfactory. Under present methods of conducting transportation and the widespread distribution of commodities it is often more difficult when property has been lost by the carrier to ascertain the value thereof at the point of destination than at the point of shipment, where there frequently has been a sale which fixes the value. While it is true that at the

destination in this particular case there is a market for this commodity which determines its value, this is not always the case. It was found upon consideration of the entire matter that it would be the wiser policy to adopt the value of the commodity at the time and place of shipment, and especially to accept the invoice value. This renders the ascertainment and adjustment of damages comparatively easy and tends materially to check the litigious prosecution of exaggerative claims of damage. Moreover, it must be remembered that although the rule works to the advantage of the carrier when the market price has advanced subsequent to the date of shipment, it benefits the shipper in case the market price at destination should decline; and it seems fairly probable that in the long run the rule would be of advantage to the shipper as often as it is to the carrier."

At page 13 the Commission makes this further comment:

"This provision of the statute does not undertake to determine how such a loss or injury shall be ascertained, and the contract in this case does not attempt to relieve the carrier from the payment of the full value of the property. It simply determines the time, place, and manner in which that value shall be definitely ascertained."

The opinion then concludes thus:

"After a careful consideration of this subject, which is in effect a reconsideration on our part of this section of the uniform bill of lading, we are not convinced that the provision assailed in this proceeding has been shown to have operated in an unreasonable or unlawful manner in connection with complainant's shipment. It therefore follows that the complaint must be dismissed, and it is so ordered."

The foregoing case involved a shipment of a carload of wheat. The facts, both as to the commodity transported and the bill of lading governing, are essentially the same as those in the case at bar.

In the *Minnesota Rate Cases,* 230 U. S., 352, 419, is the following regarding the Act to Regulate Commerce:

> "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

To the same effect is the case of *Loomis* v. *L. V. R. Co.,* 240 U. S., 43.

In keeping with the law laid down by this court in the cases cited, the Commission, *In re Cummins Amendment,* 33 I. C. C., 682, at page 693, in the exercise of the administrative function delegated to it by Congress and with the Cummins Amendment before it, approved the precise clause of the bill of lading dealt with in the case at bar.

V.

JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT IN THIS CASE LAY WITH THE INTERSTATE COMMERCE COMMISSION, NOT WITH THE DISTRICT COURT.

Tariffs on file with the Interstate Commerce Commission gave notice to all shippers of the contents of the Uniform Bill of Lading, including the provision that value at the place and time of shipment would govern in determining the amount of loss or damage. Tariffs are published to be lived up to strictly by the carriers and to be applied without discrimination or variation. The Commission, to which Congress delegated the authority and imposed the duty of determining and con-

trolling the reasonableness of the form and content of the carriers' tariffs and the regulations of carriers' practices, had approved the tariff publication and the bill of lading. If the conditions of the tariff were unreasonable or those of the bill of lading unjust or unreasonable, the respondent's first forum was the Commission.

In the last analysis respondent's grievance is not other than a complaint against the reasonableness of the tariff rate. The common-law shipping contract, which it insists it was entitled to, was actually open to it at a higher rate than the uniform bill of lading contract. This is a fact admitted and established by the stipulation of facts (Trans., 5) in these words:

> "Said tariff further provided that in case where the shipper was not agreeable to shipping under the terms of said contract or bill of lading then a higher rate of transportation was provided by said tariffs."

Obviously, the reason the shipment did not move under the common-law contract was the shipper's objection to paying the higher rate. If the fundamental objection is to the rate, and if a reduction in the rate would have caused the common-law shipping arrangement to have been accepted instead of the uniform bill of lading, it follows that the subject of controversy is a subject of rate regulation—therefore eminently and exclusively for the Interstate Commerce Commission to pass upon in the first instance.

The McCaull-Dinsmore Company did not institute any proceeding before the Interstate Commerce Commission for the purpose of having the clause and tariff modified. The subject matter of the complaint was not presented to the Interstate Commerce Commission before court action was taken. Though there is involved the establishing of uniformity, standardizing of shipping contracts, prevention of discrimination, publication of

tariffs and rate classifications and the application of tariff rules, the administration of which has been placed with the Interstate Commerce Commission by Congress, yet the complaint was taken direct to the District Court without preliminary action by the Commission.

The question of original jurisdiction being with the Interstate Commerce Commission in a case somewhat similar in principle was passed upon by this court in *Loomis* v. *L. V. R. R. Co.*, 240 U. S., 43. In that case the shipper made claim against the carrier for the value of the lumber furnished by the shipper to cooper grain cars that the carrier had placed for loading of bulk grain. The carrier's published tariffs did not provide for making payments to shippers in accordance with the demand of the plaintiff in that case. The case turned, as we claim this case should turn, on the question whether the Interstate Commerce Commission had original jurisdiction.

The argument we would make on this point is clearly and concisely set forth in the quotation from the opinion of Mr. Justice McReynolds, at pages 48, *et seq.*, as follows:

> "No serious dispute exists concerning the facts. The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration.
>
> The effect of the Act to Regulate Commerce, as supplemented and amended, upon the jurisdiction of courts, has been expounded in many cases heretofore decided. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Baltimore & O. R. Co.* v. *United States*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup.

Ct. Rep. 164; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. Rep. 114; *Mitchell Coal & Coke Co.* v. *Penn. R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. Rep. 916; *Morrisdale Coal Co.* v. *Penn. R. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. Rep. 938; *Minnesota Rate Cases* (*Simpson* v. *Shepard*), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729; *Texas & P. R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 58 L. Ed. 1255, 34 Sup. Ct. Rep. 885; *Pennsylvania R. Co.* v. *Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. Rep. 484; *Pennsylvania R. Co.* v. *Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. Rep. 896.

Speaking through Mr. Justice Lamar in *Mitchell Coal & Coke Co.* v. *Penn. R. Co.*, 230 U. S., *supra*, we said (p. 255):

'The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

In the *Minnesota Rate Cases*, 230 U. S., *supra*, we further said (p. 419):

'The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.'

And in *Texas & P. R. Co.* v. *American Tie & Timber Co.*, 234 U. S., *supra*, the rule was thus stated (p. 146):

'It is equally clear that the controversy as to

whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute.

Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.'

An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S., 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. Co.* v. *Puritan Coal Min. Co.*, 237 U. S., 128, 129; *Penna. R. R.* v. *Clark Bros. Coal Min. Co.*, 238 U. S., 469, 470.

If in respect to interstate business the courts of New York may determine, as original matters, rate-making problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

In the case at bar the provisions of the tariffs and the clause in the bill of lading were of long standing. McCaull-Dinsmore Company, dealer in grain, doubtless had actual knowledge of them and in law was presumed to have known them. The opportunity was open to it through a period of years to file a petition with the Interstate Commerce Commission asking that the tariff provision and bill of lading clause be modified. The Commission had ample authority, under the decision in the foregoing case, to grant proper relief, if any relief would have been proper, and to require carriers to modify their tariffs and bill of lading provision if, in the experience and judgment of the Commission, the conditions required a modification.

VI.

THE SHIPPER HAD THE ALTERNATIVE OF ACCEPTING THIS CONTRACT OR ANOTHER.

The petitioner held open to the consignor of the shipment in question, at the time the shipment was billed, the privilege of forwarding it under either of the two arrangements, (Trans., 5) namely:

(1) The uniform bill of lading, or

(2) An arrangement which excluded the clause here in dispute and left the consignor in possession of all rights a shipper had at the common law in absence of modifying contract.

This second arrangement was provided for in the tariffs then in effect in the following language:

> "Property carried not subject to all the terms and conditions of the uniform bill of lading will be at the carrier's liability, limited only as provided by common law and by laws of the United States and of the several states in so far as they apply; but sub-

> ject to the terms and conditions of the uniform bill of lading in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be ten per cent (10%) higher (subject to a minimum increase of one (1) cent per one hundred pounds) than the rate charged for property shipped subject to all the terms and conditions of the uniform bill of lading."

The foregoing clause is legally cited as follows: Western Classification No. 53, I. C. C. No. 11, effective February 20, 1915, Rule 9, paragraph "D," page 9, and is the clause referred to in the stipulation of facts (Trans., 5) in these words:

> "Said tariff further provided that in case where the shipper was not agreeable to shipping under the terms of said contract or bill of lading then a higher rate of transportation was provided by said tariffs."

The consignor's election was in favor of the uniform bill of lading which gave him the benefit of the lower rate.

The respondent succeeded to no greater rights than its consignor acquired by electing to take the lower rate with the attending obligations of the uniform bill of lading, but the respondent, having already enjoyed the benefit of the lower rate by virtue of the shipper subscribing to the clause in dispute, among others, now seeks to repudiate the contract carrying the lower rate and seeks to be accorded the more advantageous common-law basis for computing value which might have been had in the first instance by payment of the higher rate and election of the common-law arrangement.

VII.

LEGISLATIVE INTENT.

Among the clear evidences that the legislature never intended to prevent carriers extending to shippers an optional contract for a lower rate than they were willing to give under a common-law contract, or never intended to prevent the carriers including in such optional contract the clause here in dispute, are the following:

(a) The First Cummins Amendment made no radical change in the language of the Carmack Amendment so far as the clause in dispute is concerned.

(b) The Second Cummins Amendment, passed doubtless with full recognition of the fact that the uniform bill of lading, containing this clause, was in use throughout the country, not only avoided the employment of language that would make continuation of the practice unlawful, but, on the contrary, in effect approved the practice as to all commodities except ordinary live stock. The following is quoted from the Second Cummins Amendment:

> "*Provided, however,* that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value * * * agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released."

(c) When Section 20 of the Act to Regulate Commerce was again amended by the Transportation Act of 1920 that amendment left Section 20 in form such that ordinary live stock is still the only commodity regarding which the carriers and shippers are not permitted to fix by contract value at point of origin as governing in computing loss or damage.

The legislative history of the First Cummins Amendment, as it is shown in the Congressional Record, makes clear that the law had its origin in the desire to terminate the practice of railroads of limiting their liability on shipments of ordinary live stock to a fixed arbitrary amount less than actual value.

The Committee on Interstate and Foreign Commerce, in reporting the bill to the House, said:

> "The committee believes that no valid reason exists for authorizing limitations of liability on the part of carriers in contracts for the shipment of ordinary live stock and if this legislation passes, carriers will hereafter be required to respond in full amount of damages or injuries occasioned to ordinary live stock while being shipped in interstate commerce." (Report No. 1341, 63d Congress, 3d Session.)

Senator Cummins, author of the bill and a member of the Committee on Interstate and Foreign Commerce, in explaining the purpose of the measure to the Senate, said:

> "The real necessity for the bill arises from the impositions that are now being practiced by the common carriers upon the shippers and owners of live stock in this country." (51 Congressional Record, 9622.)

The declared legislative purpose was to change certain conditions created by the Carmack Amendment as interpreted in *Adams Express Co.* v. *Croninger,* 226

U. S., 491, but not to further change conditions that existed prior to the Carmack Amendment.

In alluding to the result of this court's interpretation of the Carmack Amendment, Senator Cummins further said:

> "In this bill we have tried to restore to the shippers of this country not all but a measure of the rights which they possessed and which they exercised prior to the passage of the Carmack Amendment, which inadvertently destroyed those rights." (51 Congressional Record, 9621.)

In connection with the foregoing it should be noted that the bill of lading provision regarding value at time and place of shipment was not a result of either the Carmack Amendment or the Croninger decision. It antedates them both.

See the case of *Inman & Co.* v. *Seaboard Air Line Ry. Co.*, 159 Fed., 960, 974, where, on a bill of lading issued in 1902, four years prior to the Carmack Amendment, the court said:

> "There is, moreover, a clause in the bill of lading which provides that the value of the goods lost or injured shall be 'Computed at the value of the property at the place and time of shipment.' Such a clause has been held reasonable and has been uniformly sustained."

Senator Cummins explained that the rights of shippers which had been taken away by the Carmack Amendment were those contained in the provisions of statutes of the numerous states and in the common law which prevented a carrier from limiting its liability, except by contract, and he added:

> "I am sure it was not in the mind of Congress, and certainly not in the mind of the Senator who offered the (Carmack) amendment, to make any change whatever in the law to which I have re-

ferred governing the extent of recovery." (51 Congressional Record, 9621.)

Speaking of the effect of the Carmack Amendment as interpreted by this court in *Adams Express Company* v. *Croninger,* 226 U. S., 491, Senator Cummins said the effect of the decision "is to destroy what has been, I was about to say from time immemorial, the law of the country controlling this subject, and to make it valid for railroad companies to limit their liability to a certain sum which may be named in the bill of lading." (51 Congressional Record, 9621.)

From the foregoing it is clear that the author of the bill had the intention of bringing about legislation which would prevent railroad companies from limiting their "liability to a certain sum which may be named in the bill of lading," and had particularly in mind shipments of ordinary live stock for the transportation of which, at that time, carriers were using a bill of lading or shipping contract with a provision that their liability would be limited to the value specified by the shipper for the purpose of obtaining one of two optional rates either of which was dependent upon the value declared by the shipper.

The objectionable shipping contracts applicable to shipments of ordinary live stock did not deal with value at time and place of origin but dealt with a fixed, specific, arbitrary figure of value definitely written into the contract as a positive limitation of liability.

On June 9, 1914, the bill was introduced in the House and referred to the Committee on Interstate and Foreign Commerce. (51 Congressional Record, 10089.) That committee reported it to the House on February 1, 1915, and in its report explained the object of the bill in quite the same w[illegible] that Senator Cummins had ex-

plained it in the Senate. The report reads in part as follows:

> "While at common law common carriers could not escape the consequence of their negligence by stipulating for a release of liability, either in whole or in part, yet the common law, as interpreted by the Supreme Court of the United States and by the Appellate Courts of some states, recognized as valid agreements between shippers and common carriers limiting the liability of the carrier to an agreed amount * * * The committee believes that no valid reason exists for authorizing limitations of liability on the part of carriers in contracts for the shipment of ordinary live stock, and if this legislation passes, carriers will hereafter be required to respond in full amount of damages or injury occasioned to ordinary live stock while being shipped in interstate commerce, such property being expressly exempt from the provision authorizing the Interstate Commerce Commission to establish rates based on value whereby recovery is limited to a declared value. It is believed that the effect of this legislation will be to establish natural, reasonable and just rules governing the liability of carriers for loss or damage to property caused by their negligence." (Report No. 1341, 63d Congress, 3d Session.)

From the last sentence quoted above it is clear the committee contemplated that it would be permissible under this law "to establish natural, reasonable and just rules governing the liability of carriers for loss or damage to property caused by their negligence."

We submit it cannot be fairly contended that a rule making the actual value at time and place of shipment the basis for computing loss and damage claims is unnatural, unreasonable or unjust.

On January 5, 1916, Senator Cummins introduced the Second Cummins Amendment. (53 Congressional Record, 492.) On August 11, 1916, the Second Cummins

Amendment became a law. (53 Congressional Record, 12481.)

The Second Cummins Amendment did not restrict the carrier's right to contract with the shipper that value of wheat at the time and place of shipment would control in computing loss and damage, but, on the contrary, expressly provided that the parties should be entirely free to so contract regarding all commodities, excepting only ordinary live stock, subject, of course, to the Commission's regulation and authorization. This seems quite conclusive evidence of the intent of Congress throughout the various amendments to Section 20 of the Act to Regulate Commerce.

Ordinary live stock was made the exception because of the many peculiar conditions attending the transportation of that commodity. The stockman, who raises and ships his own animals, has neither an invoice price nor a market at the time and place of shipment. Live stock, generally, moves as timed freight on account of the twenty-eight hour law. Live stock is generally shipped to be in time for a special market day. Live stock deteriorates in salability if rough handling or unreasonable delay in transit occurs. It is because the selling price or market value of a shipment of animals depends so largely on the treatment the animals receive after they come into the carrier's possession that destination value instead of point of origin value was deemed worthy of being made an exception for the benefit of ordinary live stock and in the case of that commodity only.

It is significant that during the whole period between the enactment of the First Cummins Amendment and the enactment of the Second Cummins Amendment—a period of 17 months—the carriers had in their

bills of lading, and in their published tariffs, the provision that value at the time and place of shipment would be made the basis of computation in settling loss and damage claims. Yet, it was not suggested in the discussion of the Second Amendment that this clause was objectionable, nor was there any language inserted in the Second Cummins Amendment to prevent the continuation of this method of arriving at actual value as prescribed in the carriers' bill of lading. On the contrary, Senator Cummins said:

> "This bill is intended to meet the views of the Interstate Commerce Commission and others who are interested in the subject." (53 Congressional Record, 9245.)

The views of the Interstate Commerce Commission, to which he alluded, are contained in the Commission's opinion in the case entitled, "*In re Cummins Amendment*," 33 I. C. C., 682, where, at page 693, the Commission, in concluding its report on the subject of this clause, said:

> "It is, therefore, believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

We submit the Circuit Court of Appeals has given the First Cummins Amendment a construction that is neither within the legislative intent nor the literal terms of that amendment and is not consistent with the policy and purpose of the Act to Regulate Commerce.

Respectfully submitted,

H. H. Field,
O. W. Dynes,
F. W. Root,
Attorneys for Petitioner.

Burton Hanson,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

REPLY ON BEHALF OF PETITIONER.

H. H. FIELD,
O. W. DYNES,
F. W. ROOT,
Attorneys for Petitioner.

BURTON HANSON,
Of Counsel.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY,

Respondent.

REPLY ON BEHALF OF PETITIONER.

MAY IT PLEASE THE COURT:

To answer specifically certain positions definitely taken in the brief filed by opposing counsel, we deem it advisable to submit this reply.

(a)

At page 7 of opposing counsel's brief is the assertion:

> "If the plaintiff is forced to settle this case on the basis of the value of the wheat at time and place of shipment, then it is not compensated for its 'actual' loss because the trial court has found that the value of the wheat at destination exceeded its value at point of shipment by more than $200."

The soundness, or unsoundness, of the foregoing, as a general proposition, can, we believe, be tested as follows:

The sum of $1,200.48 is what the consignee, respondent here, actually paid the Three Valley Cooperative Association for the wheat at point of origin. (Trans., 6.) As soon as the wheat was lost the respondent had an out-of-pocket "actual loss" of the sum it had paid and no more. A few days later, and on the day the shipment would have arrived had it not been lost, there would have been a profit of $221.63. (Trans., 6.) That profit never became actual. It never was realized. The $221.63 was never actually possessed by respondent.

The International Dictionary defines the adjective "actual" thus: "existing in reality; in fact; real; as the actual cost of goods— opposed to potential, possible, virtual, speculative, conceivable, theoretical, hypothetical or nominal."

The prospective profits were not actual but were, in the phrase of the dictionary, opposed to actual in that they were potential or possible or conceivable or hypothetical or speculative.

Testing the contention by the reverse situation, and assuming there would be a decline in the destination market during the period of transit such that the shipment would have sold at $221.63 less than the $1,200.48 paid for it at point of origin, opposing counsel's reasoning would lead us to the conclusion that all of the $1,200.48 would not be an actual loss; that the $221.63 never could become an actual loss but only the difference between those two figures, or $978.85, would be actually lost. Yet, if the carrier had been totally insolvent, the shipper would have been actually out of pocket to the extent of the total $1,200.48 it paid for the grain. That is precisely the amount that would go into its "profit

and loss'' accounts and precisely the amount that would be debited, in connection with this transaction, in making an income tax schedule.

(b)

At page 6 opposing counsel contends:

> ''The Cummins Act requires the carrier to do something more than to pay the full, actual loss, damage or injury to property caused by it.''*

It seems a sufficient answer of the foregoing to quote the pertinent language of the law referred to, which, separated from other provisions, is:

> ''Any common carrier * * * receiving property for transportation * * * shall be liable to the lawful holder of said receipt or bill for lading, or to any party entitled to recover thereon * * * for the full actual loss, damage or injury to such property * * *.''

Congress, in expressly limiting the liability to that loss, damage or injury which occurred to the ''property,'' gave the law the effect of eliminating such elements as injury to credit, injury to the going business, loss of prospective contracts, and made the issue solely one of property damage, loss or injury, modifying and limiting the word ''property,'' as thus used, to such property as was received by the carrier for transportation.

(c)

At page 7 of his brief opposing counsel says:

> ''The act, by unambiguous language, imposes liability for every loss to the shipper caused by the carrier as well as for the full, actual loss or damage to the property.''

The plain meaning of counsel's contention in the fore-

*For convenient reference the Carmack Amendment, the First Cummins Amendment and the Second Cummins Amendment are printed as appendix to this brief.

going quotation is that the carrier underwrites the business venture of the shipper in each instance where the shipment is lost or damaged. The contention, if upheld by this court, would make the carrier an insurer against the hazards of trade, rather than against the hazards of transportation. Moreover, it would graft upon the law a guarantee as to the time of arrival in addition to the guarantee of safe carriage.

Apart from cost of carriage, the difference between value at the place and time of shipment and value at destination represents the business venture of the shipper. It is a risk of his business and not a risk of the carrier's business.

(d)

At page 4 of his brief opposing counsel contends that among the "sweeping changes" which the First Cummins Amendment made in the existing law of the Carmack Amendment was the provision imposing "liability on the carrier to the holder of the bill of lading for *any loss,* damage or injury caused by it."

In this contention counsel is clearly in error, for the First Cummins Amendment, instead of making a "sweeping change" in the Carmack Amendment in this particular, adopted and preserved the precise language of the Carmack Amendment. So far as the language quoted is concerned, the court has nothing different before it in the case at bar than it passed upon when dealing with the Carmack Amendment in *Adams Express Co.* v. *Croninger,* 226 U. S., 491.

(e)

At page 4 of this brief opposing counsel asserts the First Cummins Amendment "was passed because of the

decisions in the *Croninger* and other cases, and was aimed directly at them."

The *Croninger* case held that an agreement as to value, which was not *actual* but was a specification of an amount other than the actual value, as the limit of the carrier's liability for loss or damage to the shipment, was valid under the law of the Carmack Amendment and binding upon the parties.

Assuming the First Cummins Amendment was aimed at such a decision, no argument results therefrom to support a theory that the First Cummins Amendment was also aimed at the agreement in the present case which requires the carrier to pay the shipper the full, actual value of the shipment at the place and time it was received by the carrier. The latter contract leaves the question of value open to proof so that actual value at that time and place may be established by any competent evidence. The contract in the *Croninger* case foreclosed the shipper and estopped him to set up a claim for actual damage and compelled him to accept in that particular case the fictitious value of $50, agreed upon, in lieu of the actual value of $137.50, found by the court. It was similar to the contract considered in the case of *Hart* v. *Pennsylvania Railroad Company*, 112 U. S., 331, where horses actually worth $25,000 had been released to a value of $1,000, and like the contract in the case of *Pennsylvania Railroad Company* v. *Hughes*, 191 U. S., 477, where a race horse worth $10,000 was released to a value of $100. It was to prevent the continuation of the released value contract that the Cummins Amendment was passed. We concede the First Cummins Amendment was aimed at that kind of contract.

(f)

At page 9 of his brief opposing counsel advances the contention that the First Cummins Amendment "prohibits the carrier not only from limiting its liability, but also prohibits any limitation as to the amount of recovery."

There is nothing in the act that prohibits a limitation of the amount of recovery, unless such limitation restricts the shipper to a recovery of less than "full actual loss, damage or injury to such (transported) property." It is only such limitations of amount of recovery as would restrict the shipper's right to receive payment for the full actual loss, damage or injury to the property transported that the terms of the act make unlawful. The bill of lading clause in controversy does not seek to limit the amount of recovery to a sum lower than actual loss, but, on the contrary, contemplates full compensation being paid for every element of actual loss, damage or injury to the property transported.

(g)

At page 6 of his brief opposing counsel says:

> "In this case the rate paid by the shipper for transportation of the wheat was not based upon the value of the grain but upon its weight, without regard to value."

The record contains no facts that support this statement, but, on the contrary, shows that differences in weight had nothing to do with the measure of the rate. There was open to the shipper the low rate he selected in connection with the contract, and there was open to him the 10 per cent higher rate which he rejected. (Trans., 5.) The 10 per cent higher rate was not predicated on 10 per cent greater weight, but on precisely the

same weight. The difference in rates, therefore, did not result from any difference in weights, but had relation to the methods of determining the bases upon which full, actual value might be computed.

(h)

At page 7 of opposing counsel's brief is the assertion:

> "There can be no uncertainty in arriving at value at destination of a commodity like wheat which is bought and sold on every grain exchange in the country. In fact, it is just as easy to determine its value at destination as it is at point of shipment."

We submit the foregoing is unsound in both conclusions.

A shipment of wheat is delivered by the shipper to the carrier at a known hour and minute of the day. The value at time and place of shipment is a then present value. What the value of that shipment will be on the day it arrives at the destination market is a contingency of the future, wholly uncertain and quite beyond calculation. Moreover, on the day it should arrive the value may fluctuate between wide extremes. A lost shipment does not arrive at all. The reasonable time for arrival is measured in units of days and does not result in a point of time confined to the hour and minute of prospective arrival. Ten days was the reasonable period of time in the case at bar. (Trans., 5.) That question is, therefore, open for dispute as to whether the value at the opening of market on that day or at the close of market on that day should govern. Or, if it is the average price of the day that is to govern, the problem is still more complicated because of the necessity of finding the weighted average from a conglomerate of transactions that may be light when the market is low and heavy when the market is high, or *vice versa*. There is neither the

ease nor certainty in arriving at destination value of wheat shipment that counsel claims.

(i)

At page 8 of opposing counsel's brief is the following

"The Cummins Act relegates the carrier to h common law liability."

The carrier's common law liability, in the absence c contract, was a liability based upon destination value an not upon any other value. The liability of the carrie to the holder of the bill of lading under the First Cum mins Amendment is "for any loss" and the liability o the carrier under that amendment to a person othe than the holder of the bill of lading, who may be entitled to recover, is "for the full, actual loss."

In the present case it is not the holder of the bill of lading but "a party entitled to recover" that is suing.

The purpose of the First Cummins Amendment and its relation to other laws and regulations governing carriers, which furnish so many of the features of controversy in the present case, can be made clear at least in some particulars by a brief outline of the causes which led to its enactment.

With this in view, we submit the following:

Since November 21, 1904, the subject of the Uniform Bill of Lading has received the administrative attention of the Interstate Commerce Commission, and in 1908, two years after the Carmack Amendment was enacted, the Commission made its report approving the Uniform Bill of Lading under which the shipment in the case now before the court was made. See: *In the Matter of Bills of Lading*, 14 I. C. C., 346-350. The Uniform Bill of Lading, so approved, was adopted by the petitioner, Chicago, Milwau-

kee & St. Paul Railway Company, and generally by all carriers by rail. It contained the provision that the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment. 14 I. C. C., bottom p. 353.

In the year 1911, this provision of the Uniform Bill of Lading was before the Commission in *Shaffer & Co.* v. *Rock Island Ry. Co.*, 21 I. C. C., 8, which involved the shipment of a carload of grain in interstate commerce, for the loss of which the party entitled to recover made the same claim is as made here, namely: that he was entitled to recover the market price of the grain at destination, Chicago,—notwithstanding the bill of lading provided that the invoice price at *place and time of shipment* should control. The Commission decided against the claim. The Carmack Amendment of June 26, 1906, was in force when the shipment was made and the case decided by the Commission.

In October, 1912, the case of *Adams Express Co.* v. *Croninger*, 226 U. S., 491, was decided by this court, holding that it was in keeping with the *purpose* of the Carmack Amendment for the carrier and shipper to agree upon a specific figure as being the value of the shipment which would bind both parties, notwithstanding the provisions of this amendment that no contract, receipt, rule or regulation should exempt the carrier from liability for *"any loss, damage or injury"* to the shipment caused by the carrier.

At about the same time the *Croninger* case was decided, this court decided two other cases involving the same question, to which two railway companies instead of express companies were parties: *C. B. & Q. Ry. Co.* v. *Miller*, 226 U. S., 513; *C. St. P. M. & O. Ry. Co.* v. *Latta*,

226 U. S., 519; and shortly thereafter decided the case o
Wells, Fargo & Co. v. *Neiman-Marcus Co.*, 227 U. S., 46
involving the construction of the Carmack Amendmen
In each of these cases an arbitrary figure was specifie
as the agreed value of the shipment and in each case th
shipper proved that the agreed value was not the actua
value.

Following these decisions the First Cummins Amend-
ment was passed by Congress and was approved as a
law March 4, 1915, and became effective June 2, 1915.
This amendment is printed in Appendix to this brief
and is discussed on pages 32 and 33 of our main
brief. Acting within its lawful administrative functions,
(*Loomis* v. *L. V. Ry. Co.*, 240 U. S., 43) and pursuant to
Section 15 of the Act to Regulate Commerce as amended,
which confers upon the Commission the power to deter-
mine and prescribe what regulation or practice is *just,
fair and reasonable,* (the purpose of the First Cummins
Amendment was to establish natural, reasonable and just
rules governing the liability of carriers for loss or dam-
age to property caused by their negligence—page 52,
main brief), the Commission, within a few days after this
amendment had been approved, entered upon a considera-
tion of what would be reasonable, fair and just provisions
in bills of lading, joint classifications and tariffs for com-
puting the actual loss, damage or injury to property in
course of shipment. This proceeding is entitled "*In re
Cummins Amendment,*" 33 I. C. C., 682. There was a
hearing before the Commission, the carriers, shippers,
live stock and business associations, chambers of com-
merce and other interests being represented. After full
hearing, the matter was finally submitted to the Com-
mission on April 20, 1915, and decided May 7, 1915, less
than a month before the effective date of the amendment,
which was June 2, 1915. The Commission had before it

in this proceeding, and fully considered, its previous action in the matter of the Uniform Bill of Lading, its ruling in *Shaffer & Co.* v. *Rock Island Ry. Co., supra*, the Carmack Amendment and its interpretation by this court in the *Croninger* case and other cases, and the Reports of the Congressional Committees having the First Cummins Amendment in charge, which reports showed that the purpose of the amendment was "*to establish natural, reasonable and just rules governing the liability of carriers for loss or damage to property caused by their negligence*" (Main Brief, p. 52), and do away with the practice of the carriers in limiting their liability to a certain agreed amount—much less than the full value—in case of damage to ordinary live stock in course of shipment.

In these circumstances, the Commission, on May 7, 1915, twenty-six days before the effective date of this amendment—promulgated its interpretation as applied to the following question:

> "*May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?*"

and answered that question as follows:

> "It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations.
>
> The Cummins Amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regula-

> tion, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment." (33 I. C. C., 693.)

The effect of this ruling of the Commission was to reaffirm the Uniform Bill of Lading which the Commission had approved and recommended for adoption by the carriers by formal order dated June 27, 1908. 14 I. C. C., 350, 353.

As we have before stated, the carriers accepted this Uniform Bill of Lading, and since 1908 have used it, and are now using it, in the transportation of all commodities other than ordinary live stock. It is the form of bill of lading under which the grain in question in this suit was being transported at the time it was lost. If, as now claimed, the provision therein that the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment, was the *wrong* that was sought to be remedied by the First Cummins Amendment, entirely different language would have been used than is found in that amendment. But this was not the purpose of that amendment. Its purpose was to destroy the effect of the decision of this court in the *Croninger case*, and to restore, not all, but a measure of the rights which shippers had prior to the passage of the Carmack Amend-

ment. Senator Cummins, in making his report to the Senate, so stated:

> "In this bill we have tried to restore to the shippers of this country *not all*, but a measure, of the rights which they possessed and which they exercised prior to the passage of the Carmack Amendment, which inadvertently destroyed those rights." (51 Congressional Record, 9621.)

It is important to keep in mind that the Cummins Amendment does not forbid an agreement which secures to the shipper the full actual loss caused by the carrier.

It is also important to note that the contention of the shipper in this case is that it shall receive not only the full actual loss caused by the carrier, but in addition shall receive a speculative profit, because it so happened that the market was higher at point of destination when the shipment would have arrived there, than the actual purchase price paid by the shipper. We point out that our opponent's entire argument on the legality of the provision in the bill of lading would have been destroyed if it had so happened that on the day the shipment should have reached destination the market value had been lower than the purchase price instead of higher. Plainly it was not the intention of the Cummins Amendment to require a carrier to speculate upon shipments transported by it. That any differences resulting from fluctuations of the market are to be excluded in the computation of damages in case of loss is expressly asserted in the language of the law which holds the carrier liable for the full actual loss, damage or injury to the *property* transported *"caused"* by such carrier. Manifestly, the carrier does not cause a fluctuation in market.

The provision in the First Cummins Amendment that it should not become effective until ninety days after its passage, is significant in connection with the action taken by the Interstate Commerce Commission, *In re Cummins*

Amendment, supra. The report in that proceeding shows that immediately upon the passage of that amendment the Commission entered upon a hearing at which all parties in interest were present or represented, and that it concluded the hearing shortly before the effective date of the amendment. Among the questions considered by the Commission in that proceeding was the very question that is now before this court for decision, viz.:

> "May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?"

The Commission answered this question in the affirmative.

Following this decision of the Commission, the carriers continued to carry, as theretofore, the provision in their bills of lading that value at the place and time of shipment should control in ascertaining the amount of the loss or damage to the property transported. This decision of the Commission, followed by the action of the carriers, if not controlling as a practical construction of this amendment, should be of weight in determining its true meaning and rational application in actual practice.

Respectfully submitted,

H. H. Field,
O. W. Dynes,
F. W. Root,
Attorneys for Petitioner.

Burton Hanson,
Of Counsel.

APPENDIX.

CARMACK AMENDMENT OF JUNE 29, 1906.

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

FIRST CUMMINS AMENDMENT OF MARCH 4, 1915,

Effective June 2, 1915.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of Section seven of an act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce

Commission," approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law,"

be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory,

or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two

years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Sec. 2. That this act shall take effect and be in force from ninety days after its passage.

SECOND CUMMINS AMENDMENT,

Approved and Effective Aug. 9, 1916.

That so much of an act to amend an act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved March fourth, nineteen hundred and fifteen, as reads as follows, to wit:

"*Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules,"

be, and the same is hereby, amended to read as follows, to wit:

"*Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage

carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY.

Brief for McCaull-Dinsmore Company.

J. O. P. WHEELWRIGHT,
Attorney for McCaull-Dinsmore Company,
311 Nicollet Avenue,
Minneapolis, Minnesota.

Hayward Brief Company, 513 Fourth Ave. So., Minneapolis.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 628.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

McCAULL-DINSMORE COMPANY.

Brief for McCaull-Dinsmore Company.

STATEMENT.

This action was instituted to recover the value at destination of certain wheat lost in transit while being transported from Three Forks, Montana, to Omaha, Nebraska. For brevity the McCaull-Dinsmore Company will be herein referred to as plaintiff, and the petitioner as defendant. Defendant claimed that the measure of damages to which plaintiff was entitled was governed by that provision in the bill of lading reading as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid."

Plaintiff claimed, however, that this clause was in violation of the so-called Cummins Act. 38 U. S. S., et al., pp. 1196, 1197, c. 176. The facts were stipulated and the case submitted to the trial court without a jury. Findings of fact and conclusions of law were found upon which judgment was entered in plaintiff's favor. The findings of fact and the conclusions of law of the trial court are reported in 252 Fed. 664. The case was taken to the Circuit Court of Appeals by writ of error and the judgment of the trial court was affirmed. 260 Fed. 835. It comes to this court on a writ of certiorari.

ARGUMENT.

The trial court concisely stated that

> "The sole question in this case is, whether the loss to the shipper is to be measured by the value of the property at the place of destination at the time it should have been delivered, or by the value of the property at the time and place of shipment. And the decision of this question must depend upon whether or not the provision or stipulation in the bill of lading, issued by the carrier and accepted and agreed to by the shipper, that the loss should be measured by the value at the time and place of shipment and settled on that basis, was valid under the Cummins Amendment of March 4, 1915, to the Interstate Commerce Act, which was the law in force at the time of the shipment and of the loss." 252 Fed. 664, 665.

On January 6, 1913, this court in *Adams Express Company v. Croninger*, 226 U. S. 491, construed the Carmack Amendment and held valid a stipulation in the carrier's receipt or bill of lading limiting its liability to the agreed or declared value, where such receipt or bill of lading as well as the published rates on file with the Interstate Com-

merce Commission plainly showed that two rates were offered to the shipper based on value and that the goods were forwarded at the low value in order to secure the low rate. The rule announced in this case was followed in *C., B. & Q. Ry. Co. v. Miller*, 226 U. S. 513; *C., St. P., M. & O. Ry. Co. v. Latta*, 226 U. S. 519; *M., K. & T. Ry. Co. v. Harriman*, 227 U. S. 657, decided March 10, 1913; *C., R. I. & P. Ry. Co. v. Cramer*, 232 U. S. 490, decided February 24, 1914.

On March 4, 1915, the Cummins Act was passed as an amendment to the Interstate Commerce Act.

Stripping the act to its bare bones down to the proviso, which for present purposes is not here important, it provides:

> "Any common carrier * * * subject to the provisions of this act receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury caused by it * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed; and any such common carrier shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon whether such receipt or bill of lading has been issued or not for the full actual loss, damage or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

This act made sweeping changes in the then existing law. As the trial court said it was passed because of the decisions in the *Croninger* and other cases and was aimed directly at them. When analyzed it clearly appears:

1. That it imposes liability on the carrier to the holder of the bill of lading *for any loss, damage or injury caused by it.*

2. That by no contract, receipt, rule, regulation or other limitation of any character whatsoever, can the carrier exempt itself from the liability imposed by the act.

3. That in addition to the liability to the holder of the bill of lading for any loss, damage or injury caused to him by the carrier it charges the latter with liability "for the full actual loss, damage to such property caused by it."

4. That any *limitation of liability* or any *limitation of the amount of recovery* or *any representation* or agreement as to value, however attempted to be created, is unlawful and void.

The language of this act is plain and admits of no more than one meaning. There is no occasion to resort to the debates in Congress when it was under consideration nor to the investigations of the Interstate Commerce Commission. In *Caminetti v. United States*, 242 U. S. 470, this court said:

> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reading the true meaning of the legislature in cases of doubtful interpretation (citing cases). But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their in-

troduction, or from any extraneous source. In other words, the language being plain and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the legislative intent" (p. 490).

If the language of this act is plain, as we claim it is, and the provision in the bill of lading fixing liability at time and point of shipment is within the prohibitions of the act, then it is the sole function of the court to enforce the act according to its terms. Nor is it important that its enforcement may create universal uncertainty among shippers and carriers or the other dire results referred to by counsel.

Before passing to a discussion of the question whether in fact the provision in the bill of lading here involved violates the terms of the Cummins Act, we desire to direct the attention of the court to the fact that the bill of lading in this case and the facts involved under it are not within the scope of the *Croninger* case or within the recommendations of the Interstate Commerce Commission when considering the effect of the act. As we have previously pointed out, the *Croninger* case upheld a stipulation in the bill of lading limiting liability to the agreed or declared value where such receipt or bill of lading as well as the published rates on file with the Interstate Commerce Commission plainly showed that two rates were offered based on value and that the goods were forwarded at the low value in order to secure the low rate. In the discussion of the Cummins Act, 33 I. C. C. R. 682, the Commission said:

"Where rates are lawfully dependent upon declared value, the property and the rates are classified according to the character of the property of which the value of the property may constitute an element and such classification is necessarily as of the time and place of

> shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

In *Springfield Light, Heat & P. Co. v. Norfolk & W. Ry. Co.*, 260 Fed. 254, 261, the published rate was based on the *value* of the coal at the mine.

In this case the rate paid by the shipper for the transportation of the wheat was not based upon the value of the grain but upon its weight without regard to value. The trial court has so found in the following language:

> "That after the rate was fixed by the Interstate Commerce Commission the freight charges received by the defendant on said shipment of grain were based upon the weight of the grain shipped without regard to value." (See Record in Circuit Court of Appeals, pp. 8 and 9).

THE CUMMINS ACT REQUIRES THE CARRIER TO DO SOMETHING MORE THAN PAY THE FULL ACTUAL LOSS, DAMAGE OR INJURY TO PROPERTY CAUSED BY IT.

Counsel argue in the court below that the Cummins Act "limits the liability to loss, damage or injury to the property." They say: "There is nothing to suggest even that other losses should be included such as expected profits or consequential damages." (See page 15 brief for plaintiff in error in Circuit Court of Appeals.) We do not so read the act. There are two separate and distinct provisions with respect to liability. The first is that the carrier "shall issue a receipt or bill of lading * * * and shall be liable to the lawful holder thereof for any loss, damage or injury caused by it," and the second, is that the carrier "shall be liable to the lawful holder of said receipt or bill

of lading * * * for the full actual loss, damage or injury to such property caused by it." If is it the purpose of the act to limit liability to property damage alone then what necessity was there for imposing liability for "any loss or damage caused by it"? Counsel's interpretation entirely excludes that provision. We know of no rule of construction by which that can be done. The act by unambiguous language imposes liability for every loss to the shipper caused by the carrier as well as for the full actual loss or damage to the property. If the plaintiff is forced to settle this case on the basis of the value of the wheat at time and place of shipment, then it is not compensated for its actual loss, because the trial court has found that the value of the wheat at destination exceeded its value at point of shipment by more than $200. 252 Fed. 665. There can be no uncertainty in arriving at the value at destination of a commodity like wheat which is bought and sold on every grain exchange in the country. In fact it is just as easy to determine its value at destination as it is at point of shipment. The manner in which buyers and sellers of grain on public exchanges carry on their business is a matter of public and common knowledge. When a grain dealer purchases a carload of wheat or more in the country he sells it for future delivery, either for shipment as soon as he can get the cars, or for a specific delivery in the terminal markets within a certain number of days; or he may sell it for delivery in a specified month, say for example September, January or May. The buyer depends upon the delivery of the wheat to meet his own contracts. If the wheat is lost in transit as in this case, upon receiving notice of the fact from the carrier the buyer must go into the market and buy to protect his contract. If the

market has advanced above that of the date of his purchase, then to measure his damages by the value at point of shipment results in a loss to him. On the other hand, if the market has declined the carrier gets the benefit of such decline.

To sum the whole matter up: There is no fairer way both to the carrier and to the shipper that can be devised in case of grain lost in transit than to measure the damages by value at destination.

THE CUMMINS ACT RELEGATES THE CARRIER TO ITS COMMON LAW LIABILITY.

We believe that it was the deliberate purpose of the Cummins Act to prohibit carriers by any form of contract from extending their common law liability. *C., M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133. Prior to the passage of this act there was a hopeless confusion among the authorities as to the validity of a stipulation such as we have under consideration here. Some courts, notably Pennsylvania, hold such a stipulation to be against public policy and void. *Penn. Ry. Co. v. Hughes*, 191 U. S. 477. Other courts hold it to be valid if based upon a valid consideration such as a reduced freight rate. (That is not this case.) Other courts hold that if fairly entered into it does not require a reduced rate. Some courts have held that it is not a limitation of liability at all, but merely provides a standard by which valuation can be determined. But whatever view has been taken with regard to it we think it is generally conceded that it is an extension by contract of the carrier's common law liability. We do not believe that any case can be found holding it to be valid in the

teeth of such a statute as the Cummins Act. If the act was limited to a prohibition only against the carrier limiting its liability, then there might be some ground for adopting the rule that the stipulation is not a limitation of liability, but simply fixes a standard by which values can be determined. But it goes farther and prohibits the carrier not only from limiting its liability, but also prohibits any limitation *as to the amount of recovery*. Counsel in this case practically concede that the enforcement of the stipulation in this case would result in a diminution of plaintiff's amount of recovery. We are of the opinion that the act expressly forbids any agreement whatsoever as to the amount of recovery. In our judgment it is the plain purpose of the act, as previously stated, to wipe out and make valid every contract, rule or regulation by which the carrier attempts to exonerate itself from any liability existing at common law and forces it to transport property intrusted to its care under its common law liability. It must be conceded that if this stipulation was not in the bill of lading now under consideration the carrier's liability would be measured by value at destination for that we understand to be the common law rule.

Counsel concede that the general rule at common law was that damages for the loss of or injury to property should be computed upon the basis of its market value at the place where, and the time when, the shipment was to be delivered (see p. 10 of their brief attached to the petition for writ of certiorari).

Upon no possible theory can this cause be held to present a problem involving rate making or the administrative functions of the Interstate Commerce Commission; so that it cannot properly be held in our judgment that the juris-

diction over the subject matter involved in this cause lay with the Interstate Commerce Commission instead of with the District Court of the United States.

For the foregoing reasons it is respectfully urged that the judgment of the Circuit Court of Appeals should be affirmed.

J. O. P. WHEELWRIGHT,
Attorney for McCaull-Dinsmore Company,
311 Nicollet Avenue,
Minneapolis, Minnesota.

unlawful and void, a shipper, in case of loss, is entitled to damages on the basis of value at the place of destination at the time when the property should have been delivered if that is greater than the value at place and time of shipment, notwithstanding his Uniform Bill of Lading provided for computing damages on the latter basis. P. 99.
260 Fed. Rep. 835, affirmed.

THE case is stated in the opinion.

Mr. O. W. Dynes, with whom *Mr. H. H. Field*, *Mr. F. W. Root* and *Mr. Burton Hanson* were on the briefs, for petitioner.

Mr. J. O. P. Wheelwright, for respondent, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for the loss of grain belonging to the plaintiff and delivered on November 17, 1915, to the defendant, the petitioner, in Montana, for transportation to Omaha, Nebraska. The grain was shipped under the uniform bill of lading, part of the tariffs filed with the Interstate Commerce Commission, by which it was provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." The petitioner has paid $1,200.48, being the amount of the loss so computed, but the value of the grain at the place of destination at the time when it should have been delivered, with interest, less freight charges, was $1,422.11. The plaintiff claimed the difference between the two sums on the ground that the Cummins Amendment to the Interstate Commerce Act made the above stipulation void. The District Court gave judgment for the plaintiff, 252 Fed. Rep. 664, and the judgment was affirmed by the Circuit Court of Appeals. 260 Fed. Rep. 835.

The Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, provides that the carriers affected by the act shall issue a bill of lading and shall be liable to the lawful holder of it "for any loss, damage, or injury to such property . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed" and further that the carrier "shall be liable . . . for the full actual loss, damage, or injury . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer & Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law. 33 I. C. C. 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves.

We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the

question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later Act of August 9, 1916, c. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate a broad general purpose but to apply specifically to this very case.

Judgment affirmed.

THE CHIEF JUSTICE dissents for the reasons stated by the Interstate Commerce Commission.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* McCAULL-DINSMORE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 628. Argued April 23, 1920.—Decided May 17, 1920.

Under the Cummins Amendment of March 4, 1915, which provides that the carrier shall be liable for the full actual loss, damage or injury, notwithstanding any limitation of liability, limitation of amount of recovery, or representation or agreement as to value in the receipt, bill of lading, etc., and which declares any such limitation